No. 12689

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS OPENING BRIEF

P. J. GALLAGHER
MARTIN P. GALLAGHER
Ontario, Oregon
Attorneys for Appellants

HENRY L. HESS, U.S. Attorney
Portland, Oregon
WILLIAM H. VEEDER, Special Assistant
to Attorney General
Washington, D.C.
Attorneys for Appellee

Appeals from the United States District Court, for the District of Oregon.

TOPICAL INDEX

INDEX TO AUTHORITIES

Textbooks Page

Codes

Table of Cases

No. 12689

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS OPENING BRIEF

Appeals from the United States District Court, for the District of Oregon.

STATEMENT CONCERNING JURISDICTION

The complaints of appellants and some 196 other land owners and irrigators which were filed in the United States District Court for the District of Oregon allege that their action arose under the Tort Claims Act. Answers were filed and the cases put at issue. Jurisdiction of the District Court is based upon 28 U.S.C.A. Section 921 et seq.

An order was made consolidating the trials in all the cases for the purpose of determining the

general liability of the defendant and reserving the question of damages to await the determination of liability. (TR. 89)

A trial was had before the court beginning June 9, 1948 and continuing thereafter until the testimony was all in and thereafter on June 22nd, 1950, the court made and entered findings of fact and conclusions of law against the plaintiffs and final Judgment dismissing the plaintiffs complaint and awarding judgment to the defendant.

Thereafter notices of appeal were served and filed on August 21, 1950.

Based upon a stipulation of counsel this court made its order allowing all of the cases appealed to be consolidated for hearing in this court. (TR. 793)

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Title 28, U.S.C.A. section 1291.

STATEMENT OF THE CASE

The United States, through the Bureau of Reclamation constructed the Owyhee Irrigation Project in Oregon and Idaho prior to 1936.

There was the customary contract with various Irrigation Districts providing for the construction, repayment of construction costs and operating expenses, and also providing that the Secretary of the

Interior should have the exclusive operation and control of the project, and should deliver water for irrigation purposes during the period of its control. This contract is in the records and marked Plaintiff's Exhibit 1.

The North Canal distributes water to a majority of the project water users in Oregon, including the claimants.

At all of the times involved, the Reclamation Bureau has been in exclusive control of the operation of the project and all of the physical properties involved and the transportation and delivery of water to all the land owners. On July 14, 1946, there was a break in the North Canal which was not completely repaired until July 31, 1946.

Some 196 water users filed claims against the United States under the provisions of the Torts Claims Act alleging damages to their crops because of the shortage of water for irrigation. Two other land owners filed claims for damages because of flooding their property.

The issue of liability on all the cases was tried to the court without a jury, with the proviso that the trial on the issues of damages would await the decision on the question of liability.

In an opinion filed March 13, 1950, (TR. 57) the court held the defendant liable on the two cases involving flooding the land, but held that the evidence adduced by the claimants was not sufficient to es-

tablish their right to damages because of water shortage, and later, on June 22, 1950, the court made and filed its Findings of Fact, Conclusions of Law and a Judgment Order dismissing all of the shortage of water cases.

This appeal is from the court's judgment of dismissal.

Later the court fixed the damages against the defendant on account of flooding the land of the two claimants claiming that loss of damage.

STATEMENT OF FACTS

The Owyhee Irrigation Project was constructed by the Secretary of the Interior through the Agency of the Bureau of Reclamation. It furnishes water for irrigation to a large area in Malheur County, Oregon, and in Western Idaho.

It was constructed and has since been operated, exclusively, by the Secretary of the Interior and Bureau of Reclamation as a government project.

The North Canal is a part of the Owyhee Irrigation Project, and serves a large area of land in Oregon. It has a rated capacity of 1100 second feet at the head of the canal where the water is discharged from the Owyhee Dam. This diminishes as water is discharged into lateral ditches to where the capacity is about 700 second feet at what is known as Lockett Spillway, and 450 second feet at

mile post 36 (36 miles below the head). At this latter point a break occurred on July 14, 1946, and after repair, another break occurred down stream on July 19th, the broken portions joining each other. Water was out of the canal until July 31, 1946.

Farmers below this point on the canal were without water for irrigation during this period and some 193 of the farmers filed claims for damages under the provisions of the Federal Tort Claims Act.

At the point of the breaks the canal is constructed along a hillside some 200 feet above the level of the valley and for some 600 feet over and through stratums of wind and water deposited gravel and sandy constructed earth, broken up, and generally porous material. The canal was unlined at this point.

For some two years prior to 1946 there had existed several well defined and active "seeps" in the area immediately adjacent to the outer and lower bank of the canal and on either side of the point where the canal broke.

At the immediate point of the first break the outer bank of the canal was partly "in fill" that is, built up over the normal ground level. Prior to 1944 several obvious leaks or seeps developed in lands adjacent to the canal above the point of the break and a large seep some 300 feet below the break.

During 1945 and 1946, (prior to the break) a

boggy, water soaked condition developed in an area of some four acres of land opposite the point of the break commencing immediately under the toe of the canal bank and extending some 300 feet away from the canal.

This condition became so bad that parts of the land could not be plowed, nor the crops harvested by ordinary means because of the swampy condition of the land. Water rose to the surface on this area, and in a small ditch immediately under the toe of the canal.

On July 14th, some time about noon the canal failed at this point immediately above the seeped area and a large segment of the lower bank was washed away.

The canal was carrying 450 second feet of water at this point.

After the break it was discovered that the base of the canal was water soaked down below the bottom of the canal for a distance of several feet.

After the break the supply in the canal above the break was diminished by opening spillways and building check dams, and, as soon as the flow stopped, repairs were started and carried on until about July 18th at about 7:30 P. M. when an attempt was made to again carry water through the canal. The repair was not completed at that time and the floor of the canal was still far below normal grade. On that occasion a large head of water was

released above the point of the break with the result that it overflowed the newly constructed part of the canal, and, finally, about 1:30 A. M. on the 19th another segment of the canal downstream, and immediately adjoining the place of the first break, gave way and was completely washed away. This segment was so badly water soaked that it would not sustain the canal structure. After the water drained out of the canal repair work was again started and was completed on July 31st at which time water services were renewed.

During the interim plaintiffs land planted to various agricultural crops was without water for irrigation, for which damages were claimed because of the failure of the defendants to deliver water.

QUESTIONS INVOLVED

1. Whether the court erred in determining defendant's liability on the basis of negligence, instead of on the basis of failure to perform its duty to deliver water to claimants.

2. Whether the court erred in not requiring the defendant to establish an adequate defense for its failure to deliver water to the claimants for the irrigation of their lands, in accordance with its duty to the claimants.

3. Whether the court erred in dismissing appellants claim in the absence of any finding that de-

fendant exercised due care in the performance of its duty or in the absence of any finding of fact exonerating the defendant for its failure to deliver water to the claimants.

4. Whether the court erred in failing to find that the defendant had an absolute duty to deliver water to the claimants, or respond in damages for its failure to do so.

5. Whether the court erred in dismissing appellants claims, when it did find that defendant had the exclusive management and control of the project and had the duty to deliver water, and failed in that duty.

6. Whether the court erred in placing the burden on appellants to show that defendant was not justified in failing to deliver water to the appellants.

7. Whether the court erred in holding that appellants did not establish a lack of due care on defendant's part in the construction, operations, management and inspection of the North Canal. (Finding No. 13, TR. 95)

8. Whether the court erred in finding that the defendant was not bound to anticipate the breaks and the plaintiffs have failed to establish by a fair preponderance of the evidence that the defendant had such knowledge or information as would cause it to anticipate such breaks and the defendant in the exercise of ordinary care was not bound to an-

ticipate that breaks would occur. (Finding 14, TR. 95)

9. Whether the court erred in finding that at the time the first break was repaired, the defendant did not know the cause of the first break, and that defendant did not know of anything that would cause it to anticipate the occurence of the second break. (Finding No. 16, TR. 96)

10. Whether the court erred in finding that the evidence adduced by plaintiffs failed to establish the cause of either the first or the second break in the North Canal. (Finding No. 17, TR. 96)

11. Whether the court erred in finding that plaintiffs failed to prove that the defendant did not use reasonable care in the construction, maintenance, operation, inspection or repair of the North Canal. (Finding No. 18, TR. 96)

12. Whether the court erred in failing to apply the rule of res ipsa loquitur, in determining the liability of the defendant as to both breaks in the North Canal and also as to the failure of the defendant to perform its duty to deliver water to claimants.

13. Whether the findings of the trial court are not clearly erroneous.

14. What is the liability of an agency that contracts to deliver water for irrigation, and fails to perform the contract?

15. What burden of proof does a water user have to meet in an action for damages for failure to deliver water for irrigation?

16. What defences does such an agency have against an action for damages by a water user who has not received the water contracted for?

SPECIFICATIONS OF ERROR

The Statement of Points on which appellants intend to rely on appeal was filed by attorneys for appellants on October 6, 1950, and is incorporated in the Transcript on Appeal. (TR. 798)

We hereby restate our specifications of errors for the purpose of clarity, and expediency in presenting our argument.

The trial Court erred:

1. In deciding the cases on the theory that plaintiffs had the burden of proving defendant's negligence in failing to perform defendant's contractural duty to deliver water to plaintiffs for irrigation.

2. In finding that plaintiffs had the burden of proving that the proximate cause of their damage was caused by some negligent act or omission of the defendant.

3. In failing to find that defendant had the bur-

den of proving the proximate cause of its failure to deliver water to plaintiffs for irrigation.

4. In failing to find that the proximate cause of plaintiffs damage was defendant's failure to deliver water to plaintiffs lands for irrigation, and that defendant was liable for damages because of such failure.

5. In failing to find that defendant could not be relieved of its duty to deliver water to plaintiffs lands because of the breaks in defendant's canal.

6. In finding that plaintiffs had not met their burden of proof of defendant's negligence in the construction, operation, maintenance and inspection of its canals.

7. In dismissing plaintiffs cases, and rendering judgment for the defendant.

Finding No. 11 (TR. 95) is in error, because it places the burden of proof on the plaintiffs of proving why defendant failed in its duty to deliver water to plaintiffs lands for irrigation.

Finding No. 12 (TR. 95) is in error for the reason that it limits the duty of defendant to the exercise of reasonable care in performing its contract with the plaintiffs to deliver water for irrigation.

Finding No. 13 (TR. 95) is in error because it finds that plaintiffs failed to prove that the defendant exercised due care when:

(a) There was no duty of that nature on plaintiff; and

(b) Because the court failed to find defendant had used due care.

Finding No. 14 (TR. 95) is in error because it finds that defendant was not bound to anticipate breaks; and that

(a) Plaintiffs had the burden of proving that defendant had knowledge or information to cause it to anticipate breaks.

Finding No. 16 (TR. 96) is in error in finding that prior to the second break, defendant did not know the cause of the second break for the reason that such finding relieves the defendant from:

(a) The duty of making any inspection of the premises,

(b) The obligation of taking heed of conditions plainly visible, and of conditions wholly within the control of the defendant.

Finding No. 17 (TR. 96) is in error in holding that the evidence of the plaintiff failed to establish the cause of the first or second break, because:

(a) The burden of showing the cause of the breaks was not on the plaintiffs; and

(b) The testimony in the record clearly establishes the cause of both breaks, and such testimony is uncontradicted and in agreement between the parties.

Finding No. 18 (TR. 96) is in error because it finds that plaintiffs failed to prove that defendant did not use reasonable care in the construction, maintenance, operation, inspection or repair of said canal when:

(a) That burden was not on the plaintiffs; and

(b) The testimony, direct and circumstantial, and every reasonable and logical inference to be drawn therefrom proves by a preponderance, that the defendant failed in its duty in each and all of the above respects.

The Conclusions of Law are in error in the following respects:

Conclusion No. 2 (TR. 97) is in error because it is based on an erroneous Finding of Fact that:

(a) The burden of proof was on plaintiffs to establish that the proximate cause of plaintiffs damage was some negligent act or omission of the defendant, other than the duty of defendant to deliver water and the failure of that duty, which is admitted.

Conclusion No. 3 (TR. 97) is in error because it is based on the assumption that plaintiffs evidence did not establish the negligence of the defendant.

Conclusion No. 4 (TR. 97) is in error, because it is based on the assumption that plaintiffs failed to establish that defendant did not exercise due care in the respects mentioned because:

(a) Plaintiffs did not have that burden, and

(b) The testimony in the record proves by a preponderance that defendant failed to exercise due care in the respects mentioned.

Conclusion No. 5 (TR. 97) is in error because:

(a) Plaintiffs had met the burdens of proof imposed by law upon them; and

(b) Defendant had failed to meet any of the burdens imposed upon it by the contractural obligations to the plaintiffs and was liable to plaintiffs for such failure.

ARGUMENT

In presenting argument we shall endeavor to follow the chronological order of the questions involved, as above set forth.

THE DEFENDANT HAD THE DUTY TO DELIVER WATER TO THE CLAIMANTS FOR THE IRRIGATION OF THEIR LANDS

In approaching this problem it is well to have in mind the status and liability of the defendant in relation to its duties and burdens in operating the Owyhee Project.

We take its status to be established by the opinion of the Supreme Court of the United States in *Ickes vs. Fox* 300 U. S. 82, 81 L. E. 525, where we read: (530 L. E. cit.)

> "The Government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works."

This language was repeated in *Nebraska vs. Wyoming*, 325 U. S. 588, 89 L. E. 1815, (1829 L. E. cit).

The defendant constructed and had always been in the exclusive control of the Owyhee Project, and of the North Canal, at the time of the break, and was, therefore, solely responsible for the manner of its construction, maintenance and operation, and for the delivery of water to claimants. (Finding No. 9, TR. 94)

Under the terms of the Tort Claims Act, the defendant would be liable:

> "For injury or loss of property caused by the negligent or wrongful act, *or omission* of any any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C.A. 1346)

The court found that there was a duty on the defendant to furnish water to the claimants for irrigation purposes. (Finding 12, Tr. 95) Therefore, we can epitomize the position of the defendant as a carrier of water with the contractural duty to deliver water to claimants for irrigation purposes,

and the imposed duty to maintain its system in such a condition as to enable it to perform its obligation.

As a result of the two breaks in the North Canal no water was delivered to claimants from July 14th to July 31st, 1950. Hence, there was an "omission" to perform its contractural duty.

Having failed in its contractural duty, the burden is on the defendant to exculpate itself from liability, and claimants do not have the burden of negativing exculpatory facts in making out their case.

In *Long on Irrigation* (2nd Ed) 520, Section 294, we read:

> "Where, in an action against an irrigation company for failure to furnish water according to contract, the agreement to furnish water and the failure to do so are proved, it devolves upon the defendant to explain such failure, the sufficiency of the explanation offered being a question for the jury."

In *Kinney on Irrigation* (2nd Ed) Vol. 3, P. 3066, Section 1668, we read:

> "Where the duty to furnish the water is imposed by a contract between the company and the consumer, in a proper case, the courts will enforce such contracts, either by decreeing specific performance of the same, or, in some jurisdictions, by mandamus. And, if there is a breach of the contract, and the company obligated therefore fails to furnish the water, the consumer may maintain an action for damages."

In *67 C.J. 1429*, Section 1100 we read:

> "A distributor who is under a legal duty to furnish to a customer a given quantity or supply of water for irrigation may be answerable in damages for the loss or injury caused by its failure to do so. * * * "

The foregoing text is so well fortified with authorities from western states, as to make citation thereof unnecessary.

THE COURT APPLIED THE RULES OF LAW AND EVALUATED THE EVIDENCE ON THE BASIS OF A PURE TORT INSTEAD OF ON THE BASIS OF OMISSION TO PERFORM A CONTRACTURAL DUTY. THIS WAS ERROR.

By its Findings 11, 13, 14 and 18 (TR. 95-96) the court placed the burden on the claimants of establishing the reason why water was not delivered. As a matter of law, it was the burden of the defendant to establish the fact that the failure to deliver water was due to causes beyond its control or some other sufficient reason why it should be exonerated from its failure.

Pointing out the difference between "commission" (positive wrong) and "omission" (breach of duty) the author of *Street's Foundation of Legal Liability* says: (pp. 87 Vol. 1)

> "In one aspect the law of negligence finds its affinity in pure tort, in another aspect it finds its affinity in the law of contract. The subject of negligence is bisected, we affirm, by the most fundamental seam known to legal theory. In one part and from one point of view the law of negligence is controlled by and subject to principles which have been worked out in the field of pure tort; while in another aspect, and from another point of view it is controlled by principles which have been worked out in the field of contracts."

In *38 Am. Jur. 662*, Section 20 we read:

> "Accompanying every contract is a common law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract."
>
> "The sound rule appears to be that where there is a general duty, even though it arises from the relation created by, or from the terms of, a contract, and that duty is violated, either by negligent performance or negligent non-performance, the breach of the duty may constitute actionable negligence."

Here, however, there was more than the common law general duty that accompanies every relationship, where one party undertakes to perform an act. There is a contractural obligation based upon a sufficient consideration which bound the defendant to perform. The following cases speak for this rule.

Among the leading authorities on this point is *Preston vs. Farmers Irrigation Dist.* (Nebr.) 293

N. W. 243. There was a verdict and judgment for the plaintiff-respondent and the defendant-appellant complained that there was no evidence as to the amount of seepage and evaporation, which, it was contended, would affect appellant's ability to perform its contractural duties. We read: (244 N. W. cit)

> "Defendant insists, however, that, whatever the quantity of water in the canal may have been, plaintiff did not attempt to prove the amount of the probable carriage loss from evaporation and seepage, and so did not establish what the actual amount of natural flow water was that could have been delivered to him, and that he therefore did not sustain the burden of proof which rested upon him.
>
> (1, 2) *Ft. Lyon Canal Co. v. Bennett*, 61 Colo. 111, 156 P. 604, 607, is cited in support of defendant's contention. In that case it was said: 'Whether there was a sufficient volume of water in the canal at the time plaintiffs needed it was a vital issue * * * upon which they had the burden of proof.' That was an action in tort, against a third party with whom no contractual privity existed, for negligent interference with a lateral that led from the water canal to plaintiff's lands. Here, the action is one for breach of a contract to deliver water, in which defendant seeks to justify nonperformance, in part at least, on the ground of a 'supervening impossibility.' *(Restatement,* (2) *Contracts,* Sec. 457), in the nature of what is sometimes loosely referred to as a 'vis major' or an 'act of God.' The burden of exonerating itself from the obligation of a contract on such a ground rests on the defendant. *Buel* v. *Chicago, R.I. & P.R. Co.*, 81 Neb. 430, 116 N.W.

> 299. An irrigation company which seeks, on the ground of a supervening impossibility, to excuse its failure to deliver water pursuant to the terms of its contract obligation is within the operation of this rule. *3 Kinney, Irrigation and Water Rights*, 2d Ed., 3124, Sec. 1693; *67 C.J.* 1438, note 67; *15 R.C.L.* 481, Sec. 34. In this case, therefore, the burden rested upon defendant, and not on plaintiff, to show the quantity of water that it was possible to have delivered to him after taking into account all pertinent factors, including carriage loss from evaporation and seepage. Plaintiff established a prima facie case when he proved defendant's failure to deliver the quantity of water required by his contract and the extent of the damage to his crops and land from the failure to receive such a supply."

The court then quoted from *Tapper vs. Idaho Irrigation Co., Limited*, infra and cited the other Idaho cases to which we call attention, and concluded on this point with the following language: (245 N.W. cit).

> "We accordingly hold, that plaintiff was not required to produce proof of the extent of the carriage loss in defendant's canal, in order to sustain the burden of proof which rested upon him in this case."

In *Tapper vs. Idaho Irr. Co.* (Idaho) 210 P. 591, the Idaho Court took the rule from *Taylor vs. Caldwell* 3 B & S. (Bert & Smith) 122 Engl. Rep. Reprint 6, Eng. Rul. Cases 611, 826 and quoted to the effect: (596 Pac. Cit.)

> " 'Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome, or even impossible.' "

Further supporting the rule the Idaho court cited *Berg vs. Erickson* 234 Fed. 817, where Judge Sanborn reviewed the cases, State and Federal, including several decisions of the United States Supreme Court which support the legal premise that when parties agree, without exception, to perform a contract, lawful and possible of performance when entered into, subsequent hardship to the point of impossibility will not relieve the party in default from damages.

This rule of law was applied to an irrigation case by the Supreme Court of California in *Sample vs. Fresno Flume and Irrigation Co.* 61 Pac. 1085, where the water company pleaded an injunction against it in private litigation. The court cited *The Harriman*, 9 Wall, 172, 19 L. Ed. 629, and quoted from *Transportation Co. vs. O'Neil*, 98 Calif. 5, 32 Pac. 706, to the effect: (1087 Pac. Cit)

> " 'Where a party has expressly undertaken, without qualification, to do anything not naturally or necessarily impossible under all circumstances, and he does not do it, he must make compensation in damages, though the performance was rendered impracticable or even impossible by some unforeseen cause over which

> he had no control, but against which he might have provided in this contract.' "

By the foregoing authorities the defendant had the burden of going forward with evidence showing a valid reason why it had not delivered water through the month of July.

There is a definite distinction between actions against a ditch company for damages caused by seepage, and an action for damages because of a failure to perform a contractural duty. Allowing water to seep from a ditch to another's injury is a pure tort requiring the proof of negligence, while failure to deliver water although a tort, is a breach of a contractural duty and does not require an injured person to negative due care, or any defense the defendant might have. Of course the breach of a positive duty may result in a tort but when an injured party establishes the duty and a violation thereof he has made a prima facie case for recovery without sustaining the burden of showing why the defendant violated the duty.

Kinney, Vol. 3, 3067-3068:

> "Where there is a duty to furnish water, a refusal or failure to furnish the same gives concurrent remedies in tort and contract, and the consumer may recover in either form of action." (citing cases)

In *38 Am. Jur. 661, Section* 20, we read:

> "Ordinarily, a breach of contract is not a tort, but a contract may create the state of things

> which furnishes the occasion of a tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract. In such a case, the contract is mere inducement creating the state of things which furnishes the occasion of the tort. In other words, the contract creates the relation out of which grows the duty to use care."

A leading case interpreting this text is *Dustin vs. Curtis* (N. H.) 67 At. 220; 11 L.R.A. (N.S.) 504 (506), which defined negligence as:

> "Actionable negligence is the neglect of a legal duty * * * To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty."

IT WAS ERROR TO DECIDE THE CASE ON THE ISSUE OF FAULTY INSTRUMENTALITIES EMPLOYED BY DEFENDANT IN PERFORMING A CONTRACT TO DELIVER WATER.

There was another and further misapplication of legal principles by the Court in applying the rule of evidence and burden of proof required by a pure tort action, to a case involving a breach of contract.

In *Cameron County Water Improvement Dist. No. 1 vs. Parkhurst* 46 S.W. (2) 472, the Texas Court of Civil Appeals wrote:

> "Let it be granted that appellant had made a legal contract to furnish water to appellee: still, if any damages were inflicted on appellee, they must have arisen from a failure to furnish water, and not on account of defects in a flume through the railroad embankment, nor any other defect in the instrumentalities used by appellant. The question of a failure to furnish water to appellee was not presented to the jury by the court, the only two issues being:"

And quoting the alleged negligent acts submitted the court continued:

> "If damaged at all, appellee was damaged by a failure to obtain water at the proper time from appellant, no matter what caused such failure to furnish water, which would be the direct and proximate cause of the damages. This proximate cause was never submitted to the jury, but the case was made to turn on the defective condition of some agency employed by appellant to furnish water. The court ignored the question of water and made the whole case revolve around the defective flume. It is evident that there has been no legal trial of the cause."

The Court having found that there was a positive duty to deliver water, and likewise a failure to do so, claimants had a prima facie case and it was error to dismiss because we failed to satisfy the court that

defendant in breaching its duty did not exercise due care.

The burden of showing due care, or any other defense for its failure was an affirmative defense and the burden on defendant.

United States vs. Bethlehem Shipbuilding Corp. 25 Fed. (2) 157, 158:

> "It is firmly established that one who is negligent in the performance of a legal duty is liable for the proximate consequences of such negligence. This being true, it is immaterial whether such legal duty arises by virtue of a contract or a relationship, for in the former case, as well as the latter, the defendant is liable on the basis of tort for his failure to measure up to such duty."

CLAIMANTS ESTABLISHED A PRIMA FACIE CASE WHICH WAS NOT CONTROVERTED OR DISPROVED.

When the claimants established the duty of the defendant to deliver water, and the fact of non-delivery, they made out a prima facie case, entitling them to such damages as they could establish.

In *Tapper vs. Idaho Irr. Co.* (Idaho) 210 Pac. 591 (597), the court said:

> "The appellants made a prima facie case by proving the contract and failure to deliver water in accordance with its terms and consequent damages to their crops, together with the

> amount thereof. It was incumbent upon respondent to prove the failure of the water supply on account of an extraordinary drouth, * * * "

This decision was followed by the same court in *Edholm vs. Idaho Irr. Co. Ltd.* 214 Pac. 1036, where there was a reversal because of an instruction which placed the burden on the plaintiff of establishing that the defendant "had a water supply which was available to the defendant for distribution to plaintiff, but that the defendant company failed and neglected to do so to plaintiff's injury."

See also, on this point, *Meservy vs. Idaho Irr. Co.* 217 Pac. 595 (596).

> "This objection is disposed of by saying that the failure of water supply was a matter of defense to be shown by the appellant. * * * "

Further expression on this point is *Preis vs. Idaho Irr. Co.* (Idaho) 215 Pac. 466 where we find the above quotation from the Tapper case, and the following statement in the cited case:

> "On the retrial if appellant (water user) makes proof of his case in accordance with the above rule, then respondent (Irr. Co.) will be required to put in its defenses, and it will be a good defense if it proves that its failure to furnish the contract amount of water to appellant was due to an extraordinary drought, and that it delivered to appellant his just proportion of the water supply that it had."

In *17 C.J.S.* (Contracts) p. 1230 Section 590 (b) we read on page 1231:

> "A party who asserts that performance of the contract on his part has been excused has the burden of establishing the facts relied upon for such excuse; and, after proof of the execution of the contract and the breach by defendant, the burden is on defendant to show an excuse for the breach."

This is in accordance with the general rule governing liability on contractural relations.

In *17 C.J.S.* (Contracts) P. 1216, Section 578, we read:

> "Where, however, a party having the affirmative of the issue has made out a prima facie case, the burden of evidence, as distinguished from the burden of proof may shift to the adverse party; * * *"

Among the many cases supporting this rule of law is *Lemdbloom vs. Fallett* 145 Fed. 805, (808) (9th Circuit), the opinion by Judge Gilbert who approved an instruction in which the court said:

> "You are instructed that in this case the affirmative of the issues is upon the plaintiff to prove the material allegations of his complaint and reply. On the other hand, the affirmative of the issues is upon the defendants to establish the matters and things alleged in their affirmative defense."

We are unable to find any authority which would justify a finding that claimants have the burden of proving the reason why defendant failed to perform its contractural duty to deliver water.

The rule in Oregon is clearly stated in a carrier case in *Carroll vs. Royal Mail Steam Packet Co.* 130 Oregon 294, 279 Pac. 861, where it used the following language found in *Jones Commentary on Evidence*, Section 182 (864 Pac. Cit)

> " * * * When the prima facie case is established, the burden of evidence shifts to the carrier, who is to prove that the loss arose from some cause for which he is not liable * * * the limitation of his proof, or rather of his exoneration, to excepted cases only makes the shifting of the burden idle for the excepted cases are really his affirmative defense."

The rule of responsibility for a contractural duty in the State of Oregon was announced by the Supreme Court in *Pengra vs. Wheeler* 24 Oregon 532, 34 Pac. 354 in the following quotation from *Dermott vs. Jones* 2 Wall. 1: (356 Pac. Cit.)

> "It is a well settled rule of law that, if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforseen difficulties, however great, will not excuse him."

The burden of establishing some legal and adequate defense for the nonperformance of its duty rested on the defendant. It was error to place that burden on the claimants to show a lack of due care, or whatever defense the defendant might have elected to put forward.

The foregoing demonstrates a misapplication of law that justifies setting aside the judgment of dismissal.

THERE WAS A LEGAL LIABILITY UPON THE DEFENDANT TO MAINTAIN ITS DITCHES AND DIVERSION WORKS IN SUCH CONDITION AS WILL ALLOW THE PERFORMANCE OF ITS CONTRACT.

In *Niday vs. Barker*, 101 Pac. 254, the Supreme Court of Idaho announced the controlling rule of liability in the following language: (256)

> "The question is also presented here, and the contention is made, that the District should not be required to furnish respondent with water, because there is such an enormous seepage and evaporation in this five miles of high-line lateral that it is next to impossible to deliver water at respondent's farm. The evidence to that effect was offered and rejected by the court. It does not seem to us that that was a proper or material issue. It was established, and the court so found, that the canal company had in previous years actually delivered the water through this lateral to the respondent. The fact that the seepage became greater and the loss of water increased in subsequent years should not be charged to the landowner. The duty devolves upon the ditch company to maintain and keep in repair its ditches, canals, and laterals. The owner of such property must necessarily keep it in repair. Section 3307, Rev. Codes; *Bothwell v. Consumer's Co., Ltd.*, 13 Idaho 568,

92 Pac. 533; *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518."

Reference is made to the Idaho Code, which is presently Section 42-1202 Idaho Code and provides:

"The owners or persons in control of any ditch, canal, or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, * * * "

This is a counterpart of Secs. 116-408 and 116-409 O.C.L.A. which provide:

"Every corporation constructing a ditch or canal, flume, or reservoir, under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume, or reservoir; provided, that damage resulting from extraordinary and unforseen action of the elements, or attributable in whole or in part to the wrongful interference of another with said ditch or canal, flume, or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporation." (Sec. 116-408)

"Every corporation constructing a ditch or canal or flume under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and

> from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand." (Sec. 116-409).

The Oregon statutes thus prescribe a standard of care to be exercised by water serving agencies.

Colorado has a similar statute (Gen. L. 1883, Section 212) which was interpreted in *Greeley Irrigation Co. vs. House* (Colo) 24 Pac. 329 in the following language: (331)

> "It can, without doubt, be said that the defendants are responsible for any damage occasioned to plaintiff's property by reason of their failure or neglect to keep the ditch in a state of preservation and repair, and to so maintain and manage the ditch as to prevent injury to plaintiff's property while they so use and control the same; and for any injury to the plaintiff's property caused by overflow of the waters entering the ditch, resulting either directly or indirectly from the negligence of defendants in keeping the same in good repair, or in the manner of its use while under their control, they are responsible in damages. *Richardson* v. *Kier*, 37 Cal. 263. If there was a failure on the part of the defendants to comply with an express requirement of the statute in the construction, maintenance, or use of this irrigating ditch, whereby injury resulted to the plaintiff, there can be no question but plaintiff is entitled to recover. In *Wilson v. Turnpike Road*, 21 Barb. 68, it was held that an 'omission to comply with the statutory requirement is a nuisance for which a party injured without negligence on his part may claim damages.'"

This case was followed with similar holdings, in

the later cases of *Larimer County Ditch Co. vs. Zimmerman,* 34 Pac. 1111; *Garnet Ditch and Reservoir Co. vs. Sampson* 110 Pac. 79; and *Beaver Water & Irrigation Co. vs. Emerson* 227 Pac. 547.

The Colorado statute was enacted in 1883 and the Oregon statute in 1891 and judging from the almost exact language used and the purposes to be accomplished, it can be strongly inferred that Oregon adopted the Colorado statute, and should follow its interpretation by the Colorado Court.

The reclamation of arid lands is a very important element of our western economy. It involves the investment and labor of many thousands of farmers, running through several generations. Nearly 200 were affected by the break of the North Canal on the present occasion. It is but reasonable that the legislature should require of those responsible for the project a higher and more definite degree of care than is encompassed in the fluid definition of that of the "ordinary prudent man."

Thus, in *Sullivan vs. Mountain States Power Co.* 139 Oregon 282, 9 Pac. (2) 1038, the court said: (1047 Pac. Cit)

> "Clearly, the legislature had a right to exact a higher degree of care than the standard conduct of a reasonably prudent person."

When the United States entered into the business of a common carrier of water for irrigation pur-

poses, it brought its activities under the rule of care required by the statute.

Likewise, under the terms of the Tort Claims Act it would be liable to the same extent as would a private person.

The cardinal purpose of the enactment is to require stable and safe ditches and canals.

If there was a break causing loss of property by flooding, the liability would be absolute and the trial Judge so found. A loss of any other nature, proximately caused by the same reason, should be governed by the same rule.

The duty to construct and maintain a canal in condition to fulfill a contractural obligation is just as important as it would be to prevent damages by flooding caused by the failure of the same canal.

IT WAS ERROR TO LIMIT DEFENDANT'S DUTY TO DELIVER WATER, TO THE EXERCISE OF "REASONABLE CARE."

The Court found: (Finding 12, TR. 95)

> "It was the duty of the defendant to exercise reasonable care in the operation of the North Canal to enable it to deliver water to the plaintiffs for irrigation purposes."

Reasonable care is not enough to excuse the performance of a valid contract, or to avoid damages for a breach thereof.

17 C.J.S. (Contracts) P. 953, Sec. 463:

> "Where performance becomes impossible subsequent to the contract, the general rule is that the promisor is not thereby discharged and this is particularly true as regards a promisor with knowledge of facts from which impossibility of performance might have been foreseen."

In 12 Am. Jur. (Contracts) 928, Sec. 352, we read:

> "Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful."

In 17 C.J.S. 949, Sec. 459, we read:

> "*Act of party himself.* The promisors breach of an unconditional contract cannot be excused by any act of his own or of those in privity with him which prevents performance or renders it impossible."

And further in the same Text:

> "*Exercise of ordinary care and good faith.* It it not sufficient that the party shall have exercised ordinary care to perform, but nevertheless failed. So, the fact that a party has acted in good faith and exercised due diligence will not excuse delay."

In *Jonesboro Compress Co. vs. Mento & Co.* 72 Fed. (2) 3 we read: (5)

> "The only rule of law which it seems necessary to apply to this case is that rule which requires men to fulfill the contractual obligations which they assume. This rule has been stated by the Supreme Court of the United States as follows: 'It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.' Dermott v. Jones, 2 Wall. 1, 7, 17 L. Ed. 762."

Several other decisions of the Supreme Court are cited.

Contracts to deliver water are measured by the same rule of liability as indicated by authorities supra.

It was error to absolve the defendant from liability even upon a showing of due care, and it was a greater error to dismiss claimants action *without finding that defendant had exercised due care.*

Reid v. Alaska Packing Co. 43 Oregon 429 at 436, 73 Pac. 337:

> " 'The rule to be deduced from the authorities is that, if one enters into a valid contract, for a sufficient consideration, to do a lawful thing, possible in itself — that is, in the nature of things—to be done, he must either carry out the contract according to its terms or answer in damages for a failure to do so. The mere impossibility of performance in fact will not be enough, but the contract must be

obviously impossible upon its face before such a defense can be made.'"

CONSTRUCTING A CANAL OVER POROUS MATERIALS WITHOUT LINING IS NEGLIGENCE.

Every authority on this subject holds that to construct a canal through material such as the present record disclosed without any attempt to seal the pervious spots is negligence.

In *Kaylor vs. Recla*, 160 Oregon 254, 84 Pac. (2) 495, the Supreme Court of Oregon epitomizes the principle in the following language: (497 Pac. Cit)

> "Defendants' act of constructing their ditches through soil naturally incapable of retaining water, without the employment of any means to prevent seepage or percolation constitutes negligence."

The Oregon court cited among other authorities *Tormey v. Anderson Cottonwood Irr. Dist.* (Calif.) 200 Pac. 814 from which the following quotation is taken: (262 Ore. Cit.)

> "To knowingly construct a canal through loose sand or gravel incapable of holding water, in a situation such as that disclosed here, without taking any steps to prevent or control seepage therefrom, would constitute negligence. (Citing authorities)"

The Oregon Court also uses a quotation from *Kinney on Irrigation*, Section 1675 to the effect:

"The seepage of water from ditches, canals, or other works, is but one method of its escape from such works. Therefore, the same duty devolves upon the owner of such works to so construct them as far as possible so that the water will not seep or percolate therefrom to the injury of the lands of others below. * * * "

To these cases may be added:

Shields v. Orr Extension Ditch Co. (Nevada) 47 Pac. 194, where we read: (195)

"It was shown at the trial that the ditch of the defendant was upon a hillside sloping towards the lands where the damage complained of occurred. The ground through which the ditch ran was rocky and porous, and water constantly escaped, with the knowledge of the defendant, during the irrigation season, when the ditch was full; not by means of overflow, but by seepage and leakage through its banks. These facts were uncontroverted at the trial.

* * *

There was no testimony tending to show that the escape of water was the result of accident; on the contrary, the uncontradicted testimony showed a constant escape of water during the irrigating season, with defendant's knowledge."

And from *Kall vs. Carruthers* (Calif) 211 Pac. 43, the following quotation is taken: (44)

"No essential difference is usually recognized between damages caused from surface overflow and damages caused by direct percolation, reasonably traceable, whether the construction was apparently reasonably sound originally, or apparently originally imperfect. Whether the seeping nature of the soil is known or un-

known at the time of construction, the responsibility is usually held to be the same; it must be remedied by effectual intercepting trenches, by cementing, or by other means known to science. In other words, the artificial receptacle for holding the liquid, be it of whatever form or nature, must be made and maintained as nearly waterproof as human agency can reasonably and prudently make it. Otherwise, if the escaping water results injuriously by reason of the receptacle failing to properly hold the water, it then falls within the category of nuisances, or under the condemnation of negligence."

We maintain that this reasoning applies to a ditch break that causes damages from failure to deliver water as well or even more so, to a break or seep that causes damages to the land affected by flooding or seepage.

The Court continued:—(44)

"In the case now under consideration we may very properly liken the receptacle holding the water on the rice to a large reservoir (or to a 'pool' as described in the case of *Parker* v. *Larsen*, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30) in area, though not in depth, but being one constantly replenished in order to maintain an even depth for many months, thus keeping a perfect saturating medium on the ground to run or seep into the ground any place or anywhere that water will naturally flow; the sides and bottom of this receptable having the usual defects common to uncemented ditches, reservoirs, dams, and drains, in being not waterproof or sufficiently so to reasonably retain the impounded water.

"The liability of the water to do injury if allowed to escape must be continually borne in mind by the one attempting to make artificial use of it, and his failure to bear that fact in mind may be material upon the question of his liability.

"The fact that water in small quantities may be handled without doing material injury to adjoining property brings such cases 'peculiarly' under 'the application of the principle that the injury itself is evidence of negligence.' This is well stated in a note in 1 L.R.A. (N.S.) 596 as follows:

" 'The persistence with which water will seek its level renders the artificial accumulation of it above the ordinary level of the surrounding country more or less dangerous, according to the quantity of water accumulated and the susceptibility of adjoining property to injury in case of its escape. The result is that there has been some tendency on the part of the courts, as represented in the case of Rylands v. Fletcher, L.R. 3, H.L. 330, 37 L.J. Exch. (N.S.) 161, 19 L.T. (N.S.) 220, to hold one who accumulates water in large quantities as an insurer. On the other hand, water may be accumulated in small quantities without material danger to adjoining property. At the same time, the very facts that that is so, and that ordinary precaution will prevent injury from the accumulated water, render the case peculiarly one for the application of the principle that the injury itself is evidence of negligence.' "

The Supreme Court of Wyoming, in *Howell vs. Big Horn Basin Col. Co.* 81 Pac. 785, where the trial court had found a lack of negligence, reversed the judgment, and said: (791) Pac. Cit)

> "If the company saw fit to construct its ditch through soil naturally incapable of holding water, it should at least have made all proper and reasonable efforts to prevent seepage therefrom. Failing to do so, it was clearly negligent. (Citing authorities) In *Reed* v. *State*, supra, the New York Court of Appeals said: 'The attempt to collect a large body of water into a limited space surrounded with a porous and gravelly soil, without taking adequate precaution to confine it to the receptacle prepared for it, was, upon the face of it, an inexcusable act of negligence in those having charge of such work, and cannot be justified under the known laws governing the motion of fluids.' "

The Wyoming Court also cited *Scott vs. Longwell* (Mich.) 102 N.W. 230, a case involving damages caused by water seeping through the bottom of a mill race. The leakage occurred, on each occasion, after the race was cleaned and the bottom scraped. We read: (231 N.W. cit.)

> "In view of the undisputed fact, that such a race was likely to leak on account of the scraping and cracks, I think that we could safely say as a matter of law that defendants were negligent in not taking proper precaution to prevent the water escaping."

Continuing the Wyoming Court said: (791)

> "But if it be true that the ditch was constructed in such a place and manner or through such soil that it was impossible to prevent the continuous and large amount of seepage that occurred, or at least to avoid the injurious consequences thereof, then it might be difficult to find any reasonable basis for holding that the defendant

had exercised the required diligence, care and skill in constructing its canal."

In the present case, defendant's experts (skilled engineers) gave it as their opinion that the unstable condition which they found and which caused the break was caused by water seeping through the bottom of the canal and accumulating in the foundation until it caused the canal bank to fail.

These cases, and others cited, supra, indicate what is good construction and maintenance and what is not, and regardless of what type of damage results, either seepage or deterioration to the point of failure and resulting water shortage it constitutes an omission of duty for which defendant is liable.

While our claim of damages is based on defendant's failure to deliver water, and not on account of seepage from the canal, these authorities are pertinent in proving that defendant's failure grew out of its lack of due care in maintaining and inspecting its facilities.

We feel that this line of authorities is ample to sustain the principle that it is negligence to construct a canal over loose pervious strata without taking any precaution to avoid danger of leaks.

THE COURT ERRED IN NOT GIVING CLAIMANTS THE BENEFIT OF THE RULE OF RES IPSA LOQUITUR

As a premise of finding that the plaintiff had not

established any negligence on the part of the defendant the court said in his opinion (TR. 65) "In view of the nature of the duty to deliver water, *res ipsa loquitur* does not apply."

It is conceded, and has been affirmatively found, that the defendant had always been, and was on July 14th, 1946, in the exclusive management, operation and control, including inspection, of the North Canal. (Finding No. 9, TR. 94)

It is also established that the break in the canal was such, that in the ordinary course of things does not happen if the one having such exclusive control uses proper care.

Mr. Gordon, defendants engineer who had charge of the repair of the break was interrogated by the court. (TR. 678)

"The Court: Well, you knew it was not a natural thing for a canal to break?

A. No, we were concerned about it.

The Court: And you didn't know what the reason was?

A. No, sir.

* * *

Q. It was unnatural and improper and unexpected for this canal to go out?

A. That is right, yes, sir." (TR. 681)

This furnishes a basis for the application of the

res ipsa loquitur rule and in determining the weight of claimants evidence they should have been given the benefit thereof.

In a recent decision of the Supreme Court of the United States, *Jesionowski vs. Boston & M. R.* 329 U. S. 452, 91 L.E. 416, 169 A.L.R. 947, the court took a working definition of the rule of *res ipsa loquitur* from the earlier case of *San Juan Light & Transit Company vs. Fequena* 224 U.S. 89, 56 L.E. 680, in the following language: (169 A.L.R. 951)

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

Ramsell vs. Ring, 173 Fed. (2) 41 (8th Cir.) took the rule as adopted in the *San Juan Light Co.* case supra, and quotes from *Lachman vs. Pennsylvania Greyhound Lines*, 160 Fed. (2) 496 to the effect: (Page 43, 173 Fed. (2))

> "The rule of *res ipsa loquitur* * * * does * * * relate to the general obligation, imposed on every plaintiff, to establish all the facts necessary to make out his cause of action * * * We must look to the law of the state in order to determine whether the doctrine of res ipsa loquitur should be applied." (Citing Sieracinski vs. Dupont Co., 118 Fed. (2) 531).

> "We must look thus to the law of Missouri to determine whether the rule applies in this case."

Therefore, we apply the law of Oregon to determine whether this is a *res ipsa* case.

In *Esberg Cigar Co. vs. Portland* 34 Oregon 282, 55 Pac. 967, a case involving flooding plaintiff's cellar and damaging a stock of goods, it was shown that no ordinary pressure was placed on the pipe at the time it broke. Judge Robert S. Bean wrote the opinion and while not referring to the *res ipsa* rule by name said: (p. 967 Pac Cit)

> "As a general proposition, a party who alleges negligence as a cause of action must, of course, prove it; but under some circumstances the accident itself and the consequent injury may be of such a nature as to raise a presumption of negligence, and thus cast upon the defendant the duty of showing that he was free from fault. The rule seems to be that whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care."

Other Oregon cases following and sustaining the Esberg case, supra, are *Chaperton vs. Portland Gen. Electric Co.* 41 Oregon 39, *67* Pac. *298*, *Boyd vs. Portland Electric Co.* 41 Oregon 336, 68 Pac. 810, and *Coblentz vs. Jaloff* 115 Oregon 656, 239 Pac. 825, in which the court said: (827 Pac. Cit)

> "It is true that because the doctrine of res ipsa loquitur is involved the burden of proof is not shifted to the defendant; but, when plaintiff has made out a prima facie case a presumption of negligence arises and it becomes incumbent on the defendant to proceed and overcome such presumption by showing that he exercised the degree of care required by law."

Later Oregon cases which are discussed supra hold that instead of a presumption, the doctrine creates only an inference.

Next was the comparatively recent case of *Suko vs. Northwestern Ice and Cold Storage Co.* 166 Oregon 557, 113 Pac. (2) 209 involving the collapse of a large water storage tank on top of a large building with a resulting injury and property damage to the plaintiff. In affirming a judgment for the plaintiff the court said: (213 Pac. Cit.)

> "In the instant case the plaintiff did nothing to cause the bursting of the tank. In the ordinary course of matters the mishap would not have occurred except through carelessness in the construction, inspection or use of the tank. And, as hereinabove stated, the premises on which the tank was located were in the exclusive possession and under the direct control of the doctrine of res ipsa loquitur, so far as *res ipsa loquitur* applies." (Citing Authorities)
> "The fact that the plaintiff in his complaint charged the defendant with specific acts of negligence does not deprive him of the benefit of the doctrine of res ipsa loquitur, so far as concerns the acts alleged." (Citing Authorities)
> "The plaintiff was not required to give direct evidence of negligence on the part of the de-

> fendant, inasmuch as proof of the manner in which the accident occurred was in itself, under the rule of *res ipsa loquitur*, a prima facie showing of negligence."

The court continued: (214)

> "When the plaintiff proved the collapse of the tank and the injuries suffered by him as a result thereof he made out a prima facie case of negligence on the part of the defendant."

The latest expression of the Oregon Supreme Court, interpreting and applying the rule, is found in the Oregon Advance Sheets Vol. 51, 215 (Nov. 28, 1950) in *Gow vs. Multnomah Hotel Inc.* which analyses the earlier cases and clarifies the effect of the rule, as establishing an inference, rather than a presumption of negligence, saying: (220 Adv. Shts. cit)

> "In any event * * * this court is committed to the proposition that *res ipsa loquitur* simply specifies certain facts or circumstances which, when found in combination, raise an inference of negligence."

The Court then quoted from *Dunning vs. Northwestern Electric Co.* 186 Oregon 379, 199 Pac. (2) 648, 206 Pac. (2) 1177, to the effect: (1190)

> "' * * * That rule *(res ipsa loquitur)* is merely a process of common sense reasoning. It assists in drawing logical inferences from circumstantial evidence which has been presented in negligence cases. * * * There is nothing artificial about the rule. It favors neither party with

> any make-weights—as, for instance, presumptions—that were coined in the mints of lawmakers. It gives to circumstantial evidence in negligence cases its real value, nothing more and nothing less. * * *'"

The Supreme Court of Washington applied the rule in a ditch break case in *Dalton vs. Selah Water Users Asso.* (Wash.) 122 Pac. 4 and because the facts are almost identical with those at bar, we quote the pertinent language used. (p. 5 Pac. cit.)

> "The appellant seeks to exculpate itself from the charge of negligence by testimony that the lining was properly installed, that the canal was patrolled daily, and that the patrolmen did not discover any indication of infirmity in the bank where the break occurred. This does not exonerate the appellant from liability. The evidence is that the water could pass through the space between the horizontal boards. If the witness Baird observed and foretold the danger, the patrolmen could have seen it had they given it a reasonable inspection.
>
> * * *
>
> "We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character."

The rule of *res ipsa loquitur* offers assistance to the plaintiffs, who, because of the nature of these cases, are unable to ascertain facts which are known only to the defendant, and material to recovery.

In those jurisdictions where the doctrine of *Fletcher vs. Rylands* applies there is small need of applying the res ipsa rule. However, in many of

those jurisdictions where the rule of absolute insurer is rejected, the courts have followed a middle ground and put the burden of proving due care on the defendant by invoking the doctrine of *res ipsa loquitur.*

Thus in *City Water Power Co. vs. Fergus Falls*, 113 Minn. 33, 128 N.W. 817, Ann. Cas. 1912 A. 108, the case involved the failure of a dam and would have been governed by *Fletcher vs. Rylands* in any jurisdiction following that doctrine. After rejecting the rule of the *Fletcher* case, the court said: (110 Ann. Cas. cit.)

> "This brings us to the question whether the maxim *res ipsa loquitur* applies to the facts alleged in the complaint. We are of the opinion that it does. The dam, its construction, and its maintenance were within the exclusive possession and control of the defendant or its agents. Dams constructed and maintained with the care required by law do not in the ordinary course of things break by the pressure of the water held back by them. The very purpose of constructing them is to impound the water of the stream. (Citing Authorities) The maxim, however, is a rule of evidence, not of pleading, and ultimate facts, not evidentiary ones, should be pleaded. On the other hand, it is true that proof of the fact alleged in the complaint in this case would establish a prima facie case in favor of the plaintiff, for the inference of facts from the facts pleaded would be that the defendant failed to use due care in the premises, hence it was negligent. It would be, from the very nature of this case, a great hardship, if not an impossiblity, for the plaintiff to affirmatively allege and prove the particular negligence in

> the construction and maintenance of the dam; but, on the other hand, the defendant knows presumably just how it was constructed and maintained. In any event, a general allegation of negligence in such respects would be sufficient."

If then, claimants had established a prima facie case, and that, in turn, created an inference of lack of due care on the part of the defendant then such inference is evidence.

There is no difference in the application of the rule in cases of damages resulting from breach of contract where the breach grew out of the negligent management of the instrumentality employed in performance, and in cases of pure tort resulting in personal injury. In one case the plaintiff is damaged in his property and in the other he suffers personal injury.

In either instance the plaintiff is endeavoring to establish liability for his damages. If his damages grew out of failure to perform a contract, because of a defective instrumentality, the res ipsa rule should be applied in the same manner and with the same results as though the plaintiff sought damages for a personal injury growing out of the same causation.

The rule is universally applied against carriers for injuries growing out of a contract of transportation. 16 Am. Jur. 366, Section 1623 et seq.

In *Danville Community Hospital vs. Thompson* 186

Virginia 746, 43 S.E. (2) 882, 173 A.L.R. 525, we read: (532 A.L.R. cit)

> "There is no good reason why the application of the rule should be limited to cases involving a particular activity. It should apply wherever the essential reasons for its being exists."

In *Esberg Cigar Co. vs. City of Portland* 24 Oregon 282, 55 Pac. 967, the rule was applied in an action for damages because of a broken water main.

Under the Oregon statute, Section 2-401 O. C. L. A. inferences and presumptions are indirect evidence. Indirect evidence is of two kinds: (1) Inference and (2) Presumption, and Section 2-402 O.C.L.A. provides:

> "An inference is a deduction which the reason of the jury makes from the facts proved without an express direction of law to that effect."

The inference of defendants negligence is supplied in these cases by the doctrine of *res ipsa loquitur*, and the prima facie case otherwise made.

We submit that such inference, supported as it is by the facts and circumstances disclosed in the record, is strong enough to call on the defendant for an explanation.

The authorities all agree that the doctrine of *res ipsa loquitur* creates a defensive burden on the defendant.

In *San Juan Light & T. Co. vs. Fequena*, 224 U.

S. 89, 56 L.E. 680, Mr. Justice Van Devanter, in determining the effect of the doctrine of *res ipsa loquitur* in analysing an inference wrote: (684 L.E. cit)

> "When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant's want of care."

Having failed to recognise the doctrine of *res ipsa loquitur* and placing the entire burden of proof on the plaintiffs, the court apparently did not consider it necessary for the defendant to meet the effect of the inference.

The authorities all agree that there is a defensive burden to be met; some cases hold to a slight degree. *Black* vs. *Brown* (Miss) 29 So. (2) 665, 173 A.L.R. 874 says, at page 879:

> "The extent of this defensive burden is at most merely to adjust the scales to equipoise but not to preponderance."

Throughout the case the defendant as its chief defense endeavored to establish that the failure and collapse of the canal resulted from hidden and undiscoverable fault. Not only did the court fail to

make a finding in defendant's favor on this contention but rejected it. (TR. 64-65)

It is error to require a plaintiff to prove particular negligence causing his injury, unaided by the evidentiary inference in a case where the *res ipsa* doctrine is applicable. *Lowery v. Hocking Valley Ry. Co.* 60 Fed. (2) 78, followed with approval in 127 Fed. (2) at 608.

In *Sweeney vs. Erving* 228 U.S. 223, 57 L.E. 815, the court in an opinion by Mr. Justice Pitney held: (819 L.E. cit)

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

Lowery vs. Hocking Valley Ry. Co. 60 Fed. (2) 78, (6th Circuit), held: (P. 79)

> "It has also frequently been said that the effect of the doctrine of *res ipsa loquitur* is merely to shift to defendant the burden of going forward with evidence, at the risk of suffering an ad-

verse verdict based upon an evidential inference or procedural presumption of negligence. But in the present case we think that the plaintiff was entitled to the charge that, in determining the existence or nonexistence of negligence, it would be permissible, although not obligatory, under the facts of the case at bar, to draw an inference of such negligence from the mere happening of the accident. While this inference or procedural presumption is rebuttable, the only evidence which will tend to rebut it is evidence of the degree of care actually used in the construction, inspection, and maintenance of roadbed and equipment. The 'explanation' referred to in decisions applying the doctrine of *res ipsa loquitur* is not an explanation merely of how the accident actually happened, unless such explanation also operates, or tends, to show the exercise of due care."

* * *

"We agree that it is not obligatory upon the jury to draw this inference of negligence, even in absence of explanation, but we think that it is equally clear that, where the facts of a case warrant an application of the doctrine of *res ipsa loquitur*, the jury should be advised that such inference is permissible. Otherwise expressed, we think that it is misleading, in such a case, to charge that the plaintiff must prove a particular negligence causing his injury, unaided by the evidential inference above referred to."

DEGREE OF PROOF NECESSARY TO OVERCOME INFERENCE

In *Hinds vs. Wheadon* (Calif.) 154 Pac. (2) 720, after defining the doctrine of *res ispa loquitur* as

adopted in California, which recognizes the necessity of an explanation by defendants the court said: (p. 724)

> "The explanation which the defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as the inference. It is for the jury to say whether the inference has been successfully met. (Citing cases) Although if the defendant fails to produce substantial evidence of the use of due care, as where it appears that precautions that should have been taken were not taken, the defense will be held insufficient as a matter of law. (Citing cases) All that he need do in any case is to produce evidence which equals in evidentiary weight the inference which the doctrine creates in favor of plaintiff."

Ales vs. Ryan 8 Calif. (2d) 82; 64 Pac. (2) 409 (421), holds:

> "The burden is not upon the plaintiff to show by evidence that the thing does not ordinarily happen if proper care is used by the surgeon, but an inference of negligence arises from the act itself which relieves the plaintiff of the onus of offering evidence as to a lack of care on the part of the defendant. The inference stands in stead of evidence."

The *Ales* case, supra, was followed in *Durzanich vs. Criley* (Calif.) 122 Pac. (2) 53, holding; (p. 56)

> "However, the trier of the fact cannot arbitrarily disregard the inference."

and finishes by saying that the inference was not refuted by the evidence offered by defendant and

ordering judgment on the strength of the inference:

> "Such failure necessitates a finding of negligence in accordance with the inference."

DEFENDANT'S TESTIMONY DID NOT REBUT THE INFERENCE OF NEGLIGENCE CREATED BY THE FACTS OR BY THE DOCTRINE OF RES IPSA LOQUITUR.

Instead of contradicting the inference of negligence that was in the case, the testimony offered by the defendant corroborated and strengthened the proof of negligence, particularly in the following respects:

(1) Defendant's witnesses testified that the base of the canal had been reduced to a state of instability because of water percolating down through the sides and bottom of the canal. (Newell, TR. 511-2 App. 113-14, Gordon TR. 658 App. 126 and Carter TR. 571, App. 111-12.)

(2) Defendant's witness Boden (TR. 542) testified to the specification of a core wall and the use of but three cubic yards of dirt over a space much smaller than the specifications called for.

(3) Defendant's testimony of inspection showed the neglect of any adequate inspection and inspection by persons not qualified adequately to inspect the canal.

(4) Defendant's testimony shows a total lack of any inspection of the area of the second break.

(5) Defendant's testimony shows the discharge of an excessive amount of water into the canal after the first repair when the canal was yet in an unfinished and weakened condition thus precipitating the second break.

(6) Defendant's testimony showed the construction of the canal over a porous terrain in an unlined canal incapable of holding water.

There was no evidence adduced by defendant showing due care, either in construction, maintenance or inspection. In fact there was no affirmative evidence offered at all by the defendant, which tended to show due care in any respect. All that defendant has to rely on is the legal presumption against negligence.

In *65 C.J.S. 1074*, Section 243, we read:

> "Plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself, and, having done this, he is entitled to recover unless defendant produces sufficient evidence to rebut the presumption. * * * "

Continuing we read:

> "The only evidence which will tend to rebut an inference or presumption of negligence is evidence of the degree of care actually used. Where plaintiff introduces evidence sufficient to make out a prima facie case of negligence, it is incumbent on defendant to rebut such showing, as considered supra (Sec. 208) by producing op-

> posing evidence of at least equal weight. On the other hand, evidence which is sufficient to rebut a presumption of negligence may be overcome by proof of physical facts and circumstances showing it to be incredible."

A closer analysis of this statement indicates that the evidence offered to meet the inference must show defendant to be free from negligence as shown by authorities cited infra.

No inference of due care can be logically drawn from the defendant's evidence in this case. Every particle of defendant's evidence augments the presence of negligence.

In weighing the evidence, plaintiff is entitled to the effect of defendant's evidence.

In the same text above quoted we read: (65 C.J.S. 1074)

> "Plaintiff is entitled to the benefit of any evidence introduced by defendant to show the negligence of the defendant."

Therefore, we are entitled to the benefit of all the testimony of defendant's witnesses showing that the canal was built over a porous terrain, that it was unlined, that water seeped through the canal bed and sides to the extent that it created a condition that would not sustain the weight of the canal as well as to the effect of defendant's testimony showing a total lack of any adequate inspection of the structure.

We are entitled to the benefit of the testimony given by defendant's witness Boden regarding the lack of constructing a core wall in the canal bank. (Tr. 542)

All that was offered to show the manner of construction was the specifications, prepared before construction work began, with no word of what was actually done in complying with the specifications.

In *Lowery vs. Hocking Valley Ry. Co.* (6th C. C. A.) 60 Fed. (2nd) 78 we read: (79)

> "While this inference or procedural presumption is rebuttable, the only evidence which will tend to rebut it is evidence of the degree of care actually used in the construction, inspection and maintenance of roadbed and equipment * * * ."

In *65 C.J.S.* 1023, Section 220 we read:

> "Defendant's explanation must be as broad as the inference arising from the operation of the doctrine, it must be a reasonable one, with as much probative force as the inference itself."

Here, defendant's evidence, instead of rebutting the weight of the inference, actually supported plaintiffs charge of negligence.

In *Dierman vs. Providence Hospital* (Calif.) 179 Pac. (2) 603, the Court of Appeals affirmed a judgment for the defendant holding that the defendant's testimony offered a sufficient basis for the jury to find for defendant.

However, the Supreme Court (188 Pac. (2) 12)

reversed on the ground that the defendants testimony did not rebut the inference created by the *res ipsa* doctrine, saying: (14)

> "The showing here goes farther than the establishment of a mere prima facie case under the doctrine of *res-ipsa loquitur*. Not only is there a prima facie showing that the accident is one which in the ordinary course of events would not have happened if defendants had used due care but the defendants themselves have established the 'possibility' or 'probability' that they used an impure and, under the circumstances, dangerous anesthetizing agent. That agent, the nitrous oxide, was at all times concerned in the exclusive possession and control of defendants."

and quoted (15) from an earlier California case *Bourguignon vs. Peninsular Ry. Co.* 181 Pac. 669, to the effect:

> " 'That, where the accident is of such a character that it speaks for itself, as it did in this case, * * * the defendant will not be held blameless, except upon a showing either (1) of satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense

> that it covers all causes which due care on the part of the defendant might have prevented.'"

The court then pointed out defendant failed to rebut the inference, particularly, that their acts were not free from an implication of negligence.

> "Such a definite cause is not shown to possess 'no element of negligence' on their part although evidence material to this issue was available to them."

In *Shearman and Redfield on Negligence* (Rev. Ed.) Vol. 1 P. 154, Section 56, we read:

> "Rebuttal of the presumption of negligence raised under the rule of *res ipsa loquitur* has been said to throw upon the defendant the burden of presenting an explanation of the accident which is consistent with freedom from negligence. The term 'explanation' as used in the cases properly connotes reconciliation of the event with the absence of negligence on the part of the defendant."

The editors cite *Carroll vs. Boston Elevated Ry. Co.* (Mass.) 86 N.E. 793, where we read: (797-798 N.E. Cit)

> "The defendant, in the explanation which it offered, was not called upon to account satisfactorily for the accident, although often times when that has been done the presumption of the carrier's negligence disappears, but only to show or explain that it has not been guilty of negligence."

As we have said elsewhere, the only evidence

adduced by the defendant as to the cause of the break in the canal is to the effect that the water seeped through the canal bed and walls, thus causing such instability that the structure failed. Thus the explanation did not free defendant from negligence, but on the contrary supported the inference and fastened negligence on the defendant.

PLAINTIFFS PROVED NEGLIGENCE WITHOUT THE AID OF RES IPSA LOQUITUR

Waiving, for the purpose of the following argument, the benefit of the *res ipsa loquitur* rule we insist that the decision relating to defendant's negligence is contrary to the decided weight of the testimony and therefore clearly erroneous.

The complaint sets out the following allegations of negligence (TR. 8, 9, 10) which we epitomize:

(A) That the canal was constructed over a porous structure which permitted seeps through the sides and bottom of the canal.

(B) That after repairing the first break an excessive head of water was turned into the canal before it was fully repaired, which resulted in causing the second break.

There is no serious dispute in the testimony regarding the character of the soil through which the canal was constructed. At least it is fully established by plaintiffs witnesses whose testimony is uncontradicted.

A. C. Merritt, plaintiffs witness, testified (TR. 297-301) that he had engaged in various types of engineering and geological work in the territory since the early 1900's; that he had extended experience in designing and building irrigation projects (TR. 337, 338); that he examined the area where the break occurred in March prior to the trial (Tr. 292) and when there was no water in the canal (TR. 295); and that he made a number of photographs (TR. 297). In answer to a hypothetical question (TR. 340-343) he testified that the break in the canal was the result of its being constructed over a stratum which absorbed water to the point of saturation and would not support the bank. (TR. 343, App. 109)

James W. Bouten, plaintiffs witness, also an irrigation engineer from 1908 on engaged in various phases of irrigation engineering and construction in Southern Idaho (TR. 409-412), testified that he accompanied Mr. Merritt in the examination of the North Canal. He was asked the same hypothetical question propounded to Mr. Merritt (TR. 424-425) and gave, as his opinion, that the saturation of the bank below, through the pervious material, caused the bank to give way, and that there was nothing there to stabilize it. (TR. 426, App. 109)

This witness further testified (TR. 414, App. 109) that the area shown in plaintiffs Exhibit 73 where Mr. Bronken stood holding a surveyor's rod showed "a very porous formation" and that the porous

structure extends about 200 feet up and down the canal. (TR. 415)

Paul Bronken, plaintiffs witness, and also an engineer and geologist, testified that he prepared Exhibit 80 (TR. 116) in which witness attempted to show the sandy, pervious formations and blocky open formations observed in the bank, and also at the top of the wash below the toe of the canal. (TR. 116)

On cross-examination he testified to the type of investigation made to ascertain the porous area. (TR. 120) On re-direct examination he testified that Exhibits 80 and 81 show the outcropping of the porous areas. (TR. 121, App. 110)

There is complete agreement as to the designation of the geological formation. Mr. Merritt designated it as what is generally known as the Idaho formation. TR. 348) Mr. Gordon, an engineer and geologist called by the defendant, testified that the formation was called the Payette formation "which the geologist call the Idaho Formation." (TR. 631)

Mr. Spofford, defendant's witness, testified it was called the Payette formation or Idaho formation. (TR. 702, App. 111) Mr. Newell, defendant's witness testified that the area was part of the Payette formation. (TR. 511) Mr. Boden, also defendant's witness, referred to the area as Payette formation. (TR. 523)

Thus the record discloses complete agreement on the type of formation over which the defendant constructed the North Canal.

Neither is there dispute about the effect of transporting water through a canal built over this particular structure. In addition to the testimony of plaintiffs witnesses Merritt and Bouton as to the cause of the break, we have the testimony of defendant's engineer, Mr. Carter, that the break occurred because of the character of the formation upon which the canal was built. (TR. 570-571, App. 111-12)

Mr. R. J. Newell, defendant's witness, an engineer of high standing and occupying a responsible position with the Bureau of Reclamation, testified similarly to the cause of the break. (TR. 511, App. 113-14)

Mr. Grant Gordon, defendant's witness and engineer in charge of repairs on both breaks testified to a similar state of facts. (TR. 618, App. 112-13, TR. 668, App. 113)

Concerning the conditions of the canal, the trial court observed in its opinion: (TR. 65)

> "It was unquestionably proved that there were structures near the canal at the points which were pervious to water, and these were saturated at the time of the break."

And at TR. 70 of the opinion we read:

> "It is shown how the flow was carried by said structures inept for such burden in this particular place."

PLAINTIFFS HAVE DEMONSTRATED NEGLIGENCE IN THE CAUSE OF THE SECOND BREAK IN THE CANAL

It will be remembered that in the late afternoon of July 18th, the first break was repaired to a degree where defendant's engineers decided to resume operating the canal. An excessive amount of water was released into the canal and about 12:30 A.M. on the 19th, a second break occurred immediately down stream from the first break, so close that when repaired, it resulted in a complete new bank extending the full length of both breaks.

Defendant's witness gave it as his opinion that the first break was caused by water seeping through the bottom of the canal and saturating the base to the point of complete instability and that the second break resulted from the same cause. (Gordon TR. 618, App. 112-13)

When the first break was being repaired no inspection was made to determine the condition of the canal at the point where it broke the second time although the areas were continuous. (Gordon TR. 677, App. 134-5) (Carter TR. 578, App. 136) and although an inspection would have disclosed the dangerous condition which existed. (Gordon TR. 680, App. 122)

The first break released the full stream then in the canal and the water, from both directions, drained out. This eroded the bed and base of the

canal down a distance of eight to ten feet at the point of the break and the erosion feathered out, up and down the canal for a distance of 350 feet from that depth to the normal elevation of the canal bed. (Gordon TR. 643-645, App. 124-6)

The first break was repaired by building a core wall of selected earth material in the center of the new bank and building the bank up to close to normal height before any water was turned down for passage through the canal. However, the bottom of the canal had not been restored to the normal elevation and was several feet below normal before this water was turned down. (Gordon TR. 645, App. 126)

This condition of the bed of the canal extended 350 feet above the break and 150 feet below the break and across the point where the second break occurred. (Gordon TR. 644-647, App. 125)

With the repair in that condition Mr. Spofford directed that water be released from above for passage through the canal. (Spofford TR. 703-704)

In releasing the water the defendant's employees closed all discharge gates from the canal, removed all the check dams and opened all the gates and structures in the canal so that the full capacity of the canal at a point above the break known as Lockett Spillway, where the canal had a capacity of 750 second feet (Newell Tr. *480)*, came down and hit the canal at the point of the break in its yet

incomplete state of repair. (Percey, TR. 214-220, 222-223, App. 115-20)

This caused the banks at the point of the break to overflow. (Hawkins TR. 150-151, App. 120-22) (Gordon, TR. 647, App. 132) During this overflow the bank of the canal was raised. (Terhune TR. 253, 257, 258, 259, App. 128-29)

About the time the water ceased to overflow the canal bank (1:30 A.M.) the second break occurred immediately downstream from the repair (Gordon TR. 610-13) with about the same resulting discharge of water as occurred during the first break.

THERE WAS NEGLIGENCE CAUSING THE SECOND BREAK IN THE FOLLOWING PARTICULARS

Knowing the saturated and weakened condition of the canal at this point defendant made no inspection in the immediate adjacent section of the canal to determine its condition. (Gordon TR. 677-678, App. 134-5)

The condition of the canal at that point was critical. (Gordon TR. 658, 659, 660, App. 129-30)

It was negligence to turn an excessive amount into the canal in its weakened condition.

The canal bed at this point of the second break was eroded far below its normal elevation when

this amount of water was turned in. (Gordon TR. 616, 646, 647, App. 130-2) (Terhune TR. 245-246, App. 132-3)

Regardless of knowledge of the conditions of the canal at the point of the second break, it was gross negligence to turn down the amount of water shown by this record into a canal with a capacity of only 450 second feet where the bottom was eroded away as shown by the testimony of Mr. Gordon.

Mr. Newell gave it as his opinion that the second break occurred because first repair was not extended far enough downstream. (Newell Tr. 497, App. 133-4)

FAILURE TO BUILD A CORE WALL IN THE OUTER BANK IS NEGLIGENT CONSTRUCTION

A core wall, or core bank, is a structure of impervious especially selected material built to a height of above the normal water line of the canal in order to prevent seepage through the bank. After the core wall is in place, the bank is then built up around and over the core wall to specifications from the materials excavated from the canal bed.

Mr. Bouton testified that good engineering would require the construction of a core wall in the outer bank of the canal at the point of the break. (Bouton TA. 419, 420, App. 157-8)

The plans and specifications required a core wall at the point of the break. (Newell TR. 467-468, App. 158-9) Speaking entirely from specifications and field notes which he read, Mr. Boden, defendant's construction engineer, testified that the specifications required a core wall for 600 feet beyond the point at which the canal broke. (Boden TR. 530, App. 159-60)

The specifications required a core wall for the entire area over which breaks occurred. (Boden TR. 531-32, App. 159-60)

It would appear that specifications called for a core wall extending for several hundred feet or as Mr. Boden said: (TR. 532)

"Oh, yes, some distance each side, continuous."

However, on cross-examination Mr. Boden limited the space over which he assumed it was actually built to an area 50 feet long over a base 3.6 feet wide at one place and 3.8 feet at another.

However, reading from the specifications, he testified: (TR. 525)

> "It also shows, by means of a dotted line here the position of a core bank wherever needed, and the specifications provide that where that is built it shall have a height, minimum height, of a foot above the designated water depth, and a minimum top width of 8 feet."

Assuming that the core wall was built as Mr. Boden read from the field notes 50 feet long by 3.8

feet wide and with a content of 3 cubic yards, it would be ineffective for the purpose of preventing seepage, because it couldn't possibly create an impervious wall above the water level.

Clearly, if built at all, it did not conform to specifications or the needs of the structure.

The purpose of the core wall was to provide an impervious bank that would prevent water soaking through. (Boden TR. 542, App. 161)

The witness had no personal knowledge that this core wall was in fact constructed (Boden TR. 539), and the notes were made before construction. (TR. 539, App. 160) The notes called for three cubic yards of earth in the core wall designed. The dimensions of the area covered by this three yards of earth was 50 feet by 3.8 and 3.6 feet. (Boden TR. 542)

THERE WAS NO CORE WALL IN THE CANAL BANK AT THE POINT OF THE BREAK

The only evidence of whether or not a core wall had ever actually been constructed came from plaintiffs witness, Terhune, who testified that there was no appearance of a core wall in the bank after the break. (Terhune TR. 238, App. 126-7) (TR. 277, App. 127)

We consider this evidence as conclusive, as defendant's engineers were present during the repair

and were witnesses at the trial and did not contradict this testimony.

The desirability of the core wall is evidenced by the fact it was required by the specifications and the further fact that its presence would have prevented the break. Mr. Bouton testified that the break could have been avoided by either putting in the same type of core wall the defendant's employees finally used, or by lining the canal. (Bouton TR. 427 (App. 161) This testimony and opinion was not challenged by defendant's witnesses. It is corroborated by the fact that since the repair the canal is dry with no evidence of seep. (Gordon TR. 639)

In fact Mr. Newell testified that a core wall similar to the one placed in the bank at the time it was repaired would have prevented any seepage through the bank and there would have been no seepage from the start. (Newell TR. 496-497)

THERE WAS NO ADEQUATE INSPECTION OF THE CANAL

The duty of inspection was not performed by competent engineers but was delegated to the ditch riders.

Mr. Spofford who was in charge of the North Canal testified: (TR. 689-690)

"Q. And what are his instructions if he encounters anything which might appear to endanger the canal?

A. His instructions are to always watch for leaks and seeps and to report any of those seeps or leaks that he has seen himself or that have been reported to him by any of the farmers."

Thus we see that the ditch riders employed are not engineers but farmers, and that they are only required to report seeps and leaks that they see, after the leak occurs.

Other than such inspection as these farmer-ditch riders made in driving their automobiles over the tortuous curves on top of the ditch bank the only other inspection consisted of Mr. Spofford's walking in the bed of the canal once in the fall of 1944 and 1945. (TR. 713, 714, 715, 716, App. 138-41)

We maintain that such inspection is wholly insufficient to insure the safety of such a structure as the North Canal.

Here is a structure 36 miles long, down to the point of the break, carrying 1100 second feet of water at the head, and 450 second feet at the point of the break. At the point of the break it was confessedly built over a porous formation that permitted water to seep through the bottom to an extent that converted the foundation into a "loblolly" of mud with no stability whatever.

The defendant depended, for the safety of the

canal, on the observations of farmer-ditch riders, selected not on their ability or training to evaluate the type of soil formation over which the canal was built or the hydrostatic pressure of this amount of water, or any of the other elements a trained engineer would be supposed to know, but rather because "that they are farmers and understand farming" and are "acquainted with the area."

The trial judge commented on this matter of inspection (TR. 68) holding that it was sufficient. This was serious error.

But in holding the defendant liable in the two cases involving flood damage the Court held that there had been no adequate inspection. (Tr. 87)

We take the liberty of quoting a portion of the Court's language at this point.

> "The defendant, knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens."

The sufficiency of the inspection was just as important to the farmers who suffered from water shortage as it was in finding the defendant liable for flooding their neighbors land.

Detailed "engineering inspection" cannot result from the casual observation of farmer-ditch riders

as they ride along a ditch bank in an automobile in the performance of their other multitude of duties.

In the first place defendant's ditch was carrying 450 second feet of water at the point of the break.

> "Water, like fire, when unrestrained, is one of the dangerous elements known to man."
> "And in the construction of these works we should remember that at all times we are dealing with a most dangerous element, and one which ever is seeking to escape."

(Kinney on Water Rights, Vol. 2, p. 1465, 1466, Sec. 836).

Water is constantly seeking its own level, and under pressure that tendency is increased. When it is transported in great volume through an unlined earthen canal on an elevated hillside there is a constant danger of escape. When the canal is built over porous structures, so open and pervious as to permit excessive seepage, the danger is magnified beyond calculation.

The trial court recognized the potential and ever present element of danger and on imposing liability in the two flooding cases said in his opinion: (TR. 86)

> "Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof."

No one can rationally say that defendant's managers had no reason to anticipate a break.

The legal principles which control defendant's duty to adequately inspect are well established.

In Oregon we find a good expression of the rule in *Suko* vs. *Northwestern Ice and Cold Storage Co.*, 166 Oregon 557, 113 Pac. (2) 209. In this case a large water storage tank constructed on top of a building burst, injuring the plaintiff. The court held it to be a res ipsa loquitur case. We read: (567 Oregon Cit. 213 Pac. Cit)

> "The defendant called as expert witnesses an engineer who had examined the tank immediately after it was built and who gave it as his opinion that the tank was properly constructed and capable of withstanding the pressure to which it was subjected, and another licensed and registered engineer who was employed by the Fire Adjustment Rating Bureau and had inspected the tank in question some nineteen times between 1927 and 1937. The main purpose of the latter engineer's inspection on all those occasions was to note the level of the water in the tank and to ascertain whether the tank was leaking or had any defects apparent to casual observation. He made no examination such as a structural engineer would make. In addition, some of the defendant's employees testified that they were on the roof of the defendant's building several times a week and would glance at the tank, to look for leaks, and at times would climb to the top of it to ascertain the water level. There appears not to have been made by the defendant, during all the time it was in possession of the property, any examination of the structural condition of the tank."

As said in the very recent case of *D'Anna v. U.S.* 181 Fed. (2) 335: (337)

> "There was evidence that the plane was given routine inspections after each 30 hours of flying time; but the person who made the inspection next preceeding the flight over Baltimore had no recollection apart from his recollection of custom as to the inspection made; and not only was his inspection report not produced, but there was evidence that it had been destroyed as a matter of routine procedure, although the dropping of the tank had been an occurrence of sufficient consequence to call for a board of inquiry. Surely, the presumption of negligence raised by the statute is not met by vague and unsatisfactory evidence of this sort."

Then after discussing rules of liability, and the fact that a gasoline tank actually became detached and fell causing injury, the court continued:

> " * * * for the falling in such case is the strongest sort of proof of either negligent operation or defective construction or equipment. Such proof is manifestly not overcome by evidence of routine inspections of the sort here produced, particularly where the reports of the inspection are not produced."

65 C.J.S. 597, Section 87 (b)

> "The inspections must be sufficiently frequent to insure a reasonably safe condition, and thorough enough to determine the condition."

Among the cases cited as authority is *Feeney vs. New York Waist House*, 105 Conn. 647, 136 Atl.

554, 50 A.L.R. 1539, involving an injury to a pedestrian on a sidewalk by falling glass from a show window. The trial court found that there was no negligence and placed the cause on an excessively strong wind. Apparently the findings were detailed and positive. In reversing, the appellate court found that there was no evidence of adequate inspection. After finding proper installation, the appellate court said: (1541 A.L.R. Cit)

> "There is no finding as to the condition of the window subsequent to its installation, except that the construction has not been changed during defendant's possession, and that no defect or condition of disrepair 'was brought to the attention of the defendant, its agents or servants.' The defendants manager entered the space surrounded by the window on an average of twice a week to arrange merchandise for display and noticed no defect or disrepair, but nothing else resembling an inspection is disclosed by the finding. * * * The existence of some defect in the condition of the window at the time and other likely causitive or contributing elements are not so negatived and excluded as to warrant the inference that the wind was the sole cause."
>
> * * *
>
> "It was incumbent upon the defendant to give such inspection as is reasonably required in order to guard against the dangerous effects of deterioration from natural causes. (Citing authorities) Such inspection must be frequent and thorough enough to determine existing conditions. * * * It was therefore incumbent upon the defendant to show that the fall of the glass and resulting injury did not occur through negligence on its part. (Citing authority) It

> was peculiarly within the power of the defendant to establish that the care required had been used in maintaining as well as in constructing the window, the facts found fall short of disclosing a sufficient compliance with this duty; on the contrary, they show that the defendant has not complied with its duty of inspection."

The defendant is bound, as a matter of law, to know of any defect in the facilities employed and if it fails in performance of its duty it cannot plead lack of knowledge of such defects.

In *65 C.J.S. 352*, Section 5 (b) we read:

> "Knowledge of the defect or danger is not a necessary element of negligence where the act or omission, in and of itself, involves a violation of a duty as in the case of the violation of a statute or ordinance in a jurisdiction where this is regarded as negligence per se, *or* where there is an absolute duty on the owner or person in charge of property to keep it in a safe condition."

Among the authorities cited in support of this text is *Ohran vs. Yolo County* (Calif.) 104 Pac. (2) 700, a case involving a long-continued slippery place in a highway. It was claimed that the supervisor did not have notice of the condition, to which the court answered: (703)

> "Where the condition is created by the party claimed to be liable no further notice is necessary."

An earlier California case *Sandstoe vs. Atchinson T. & S. F. Railroad Co.* 82 P. (2) 216 held (219)

> "There is no merit in defendant City's contention that it had no notice of the dangerous condition. According to the allegations of the complaint the City created the condition for which plaintiff seeks to hold it liable. Under the decisions it was not necessary for plaintiff to allege further notice."

In *Sears Roebuck & Co. vs. Peterson* 76 Fed. (2) 243 (8th Cir) we read: (246)

> "It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises. It is universally held that the owner of the premises is charged with notice of any structural defects in his property on the theory that one must be charged with notice of his own act, and hence, whenever defective conditions are due to the direct act of the defendant or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied." (Citing Authorities)

In *Mattson vs. Central Electric and Gas Co.* 174 Fed. (2) 215 (8th Cir) a case involving escaping gas, Judge Gardner discussing the duty to inspect wrote page 220:

> "While the foundation of liability for negligence is knowledge, in law an opportunity by the exercise of reasonable diligence to acquire knowledge is equivalent to knowledge, and one under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance."

DEFENDANT'S OFFICERS HAD ACTUAL NOTICE OF A DANGEROUS CONDITION IN THE CANAL SO CLOSE TO THE BREAK AS TO CHARGE THEM WITH KNOWLEDGE OF A SIMILAR CONDITION ANYWHERE IN THE CLOSE VICINITY.

As a matter of fact, not only the defendant's engineers, the project manager, and the ditch riders had actual knowledge of a constant seep only 300 feet north and down stream from the point of the break. The stream emanating from this seep was visible from the highway on top of the canal bank.

> Spofford TR. *714* "Well, that is very noticeable from the canal bank."

These same officers had actual notice of the seep in the Hust field some short distance south and above the point of the break. (Spofford TR. *713)* and Pettet Tr. *760*, App. 142-3) Nothing has ever been done to repair these two seeps.

The engineers, at least, had actual knowledge of the porous terrain over which the canal was built between these points but so far as their testimony indicates no employees of defendant's ever looked for any other indication of weakness anywhere in the area and especially between these two very obvious seeps. True, Mr. Spofford walked in the bed of the canal once in the fall of 1944 and again in the fall of 1945 trying to find the source of the leak in the Hust field, but never walked over or

looked in a place where a seep would show up. Seeping water would escape downward, not upward, and would show on the outside and at the toe of the canal (where everyone else saw it) and not on the top of the bank where, of course, it was dry.

Mr. Newell, Mr. Carter and Mr. Spofford were all engineers in the employ of defendant, and, judging by their testimony as to qualifications, were competent to inspect the canal and yet, this all important duty of inspection of a hillside canal, carrying 450 second feet of water through a porous, unlined structure was delegated exclusively to a farmer-ditch rider who had a multitude of other time consuming duties. (Pettet Tr. 758)

> "A. Well, I maintain ditches, help clean them, keep the weeds out and all of the obstructions out of the ditch, and keep the gates and weirs free, and then, of course, I keep the account of the water for the season for each water user."

The Court was greviously in error when he suggested that this manner of inspection was adequate.

Similar inspection was held inadequate in *Suko vs. Northwestern Ice etc.* quoted supra, where the water was static in a wooden tank.

The Oregon rule, taken from *Price vs. Oregon etc. R. Co.* 47 Oregon 350, 83 Pac. 843, to the effect that:

> "The true test, considering all the circumstances

> is, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff and to have made provision therefore."

is employed by Professor Wiel in his text on Damage by Ditch Breaks. *(Wiel on Water Rights* Vol. I, P. 491)

The trial Court wrote in his opinion. (TR. 63)

> "However, there is no doubt from the testimony which is now in the record that the defect could have been discovered had proper tests been taken at the time of construction or afterwards. Competent engineers, however, must admit that the mere fact that these structures, which would not hold water, were buried four to six feet beneath the canal and over a space of two hundred to three hundred feet along the central line could have discovered with proper tests at the time of construction."

The Court's thinking could have very well gone further, and placed the blame for the condition of the canal on the omission of a core wall, called for by the specifications. Such was the opinion of Mr. Newell, defendants witness, who is perhaps the most outstanding irrigation and general hydraulic engineer in the Northwest, who testified: (TR. 496-497)

> "Q. Do you think that by putting in the core wall as Mr. Terhune testified was put in, you have cut off the seepage through the side of the canal?
>
> A. I think so.

Q. That would lead to the other conclusion that if a core wall of the same type was put in to start with you would have, perhaps, not have any seepages through it?

A. I think that is correct."

This testimony, coming from the engineer who supervised the construction of the canal (TR. 456) should have satisfied the condition the Court had in mind when he wrote: (TR. 64)

> "If the simple device of building a core would have prevented the disaster, this necessity seems too plain for argument."

The trial Court, in imposing liability on defendant in the two flooding cases, recognized that a high degree of danger called for a high degree of care and held that this degree of care had not been observed (TR. 87, App. 142) and further observed: (TR. 85)

> "Since a high degree of danger calls for a very high degree of care, inspection by untrained persons was no defense but that the examination by a highly trained expert might be required."

The Court was speaking here of the same defect, inspected by the same employees, regarding the same structures, and the same failure, and the same evidence, upon which he had dismissed plaintiffs claim of damages for shortage of water.

We can't appreciate this distinction.

DEFENDANT WAS BOUND TO ANTICIPATE BREAKS

Here again the Court's finding (No. 14 Tr. 95) in which it is found that defendant need not anticipate breaks is contrary to the facts and to the laws of hydraulics as it pertains to irrigation canals.

There is always to be considered the fact that water, confined in artificial structures, is bound to seek its own level. That is why water runs downhill. The larger the body, the greater danger from the pressure.

Aside from the fact that defendant was conveying a large head of water over a dangerous terrain, in an unlined ditch, it had had the experience of two earlier breaks on the same canal. (Newell TR. 467, App. 143-4 Tr. 484, App. 144-5)

And there is always danger where the canal cross-cuts porous areas. (Newell TR. 485)

> "Q. Now, do you recognize the fact that there might be danger in cross-cutting a porous stratum that would soak up water where there is no core wall that would cut that porous stratum off?
>
> A. Wherever specially pervious stratum was encountered it should have attention."

There is another element of negligence on a crucial point, where the testimony of plaintiffs witnesses is uncontradicted. That refers to the seepage from the canal at the immediate point of the break,

and on what is known in the record as the Shaw Ranch, and the failure of defendant to discover it and make repair or make such an inspection of the canal as would reveal its dangerous condition.

The area affected by this excessive water is four and a half acres in extent and is delineated on plaintiffs Exhibit 82. (TR. 114-115).

This condition was very acute during 1945, the year before the break occurred, and again in 1946 prior to the break. Some five witnesses were called by the plaintiff who testified on this point.

Mr. Theodore Matherly was called by the plaintiffs and testified that he plowed the field immediately below the point of the break in March, the year before the break, and could not finish the plowing because the land was too soft. (Tr. 125-9, App. 146-8)

This condition existed before any water had been used for irrigation that year. (Tr. 132).

Mr. Arthur Hawkins was called by the plaintiffs, testified that he plowed that field in 1945 before any water had been used for irrigation and that it was wet, that his equipment would not work, (Tr. 138-142, App. 148-50)

In 1946 this witness observed an attempt to harvest the hay crop and testified that there was seepage there. (Tr. 144)

George Hust was called as a witness by the plaintiffs and testified that he assisted the owner of the ranch in irrigating this tract of land in 1945; that a small lateral ditch was used for that purpose; that the headgate to this ditch was closed but water was running in the ditch for part of its length. (Tr. 171, App. 150-1)

This lateral was closed to any flow from the canal, or any other ditch, (TR. 184), and was built very close to the toe of defendant's canal. (Carter TR. 579-80, App. 156-7)

> "I would say in some places it was 5 feet and in other places it was maybe 20 feet away it didn't exactly follow the toe of the bank."

John Turner was called as a witness by the plaintiffs and testified that he helped his uncle Ben Shaw who owned the land delineated on Exhibit 82, put up his hay and there were several spots where only horses could be used because machines mired down. (Tr. 187-9, App. 151-3)

Mr. Ben Shaw was called as a witness by the plaintiffs and testified that he owned the land known as the Shaw place and that there was an excessive amount of water in the land immediately below the point of the break. (TR. 201, App. 153-4)

None of the plaintiffs witnesses who testified on this point have filed any claims for damages and their testimony was not contradicted, although none

of the defendant's witnesses admit they had any knowledge of the conditions above described.

In addition to the conditions above described it is admitted that some 300 feet north of the wet area shown on Exhibit 82 there is another leak in the canal from which water runs the year around. (TR. 202.)

This particular seep was well known to the defendant's agents. (TR. 713.)

Then immediately south of the point of the break there is another seep that bubbles up and out of the ground also, (Tr. 176, 179) and there are three other seeps on the Hust Ranch. (TR. 178)

Mr. Spofford, defendant's irrigation manager, knew of this particular leak in 1944 and thereafter. (TR. 691)

The conditions revealed by the witnesses indicate the presence of danger to the stability and safety of the canal structure.

Mr. R. J. Newell, defendant's witness, and long a manager of defendant's projects in Oregon and Idaho testified that if these conditions existed as testified to by plaintiffs witnesses it indicated danger. (Tr. 491, App. 154) and again (TR. 487-488, 507 App. 154-5).

Mr. Carter, defendant's witness, and project engineer testified. (TR. 579-580, App. 156-7).

It is our contention that any reasonable inspec-

tion of the canal, or of the terrain over which it was built would have revealed this dangerous condition as early as 1945, a year before the break occurred.

The only inspection maintained or performed is indicated by the testimony of Mr. Spofford, defendant's manager who testified that in the fall of 1945 he looked for the source of seepage that occurred in the Hust field south of the point of the break by walking in the bed of the canal after the water was turned out that fall. (Tr. 713, 714, 715, 716).

Of course the danger of damages, incident to a lack of water for irrigation was perfectly apparent to defendant's agents. Some 18,000 acres of land were served by this canal below the point of the break. The break happened on July 14th, the height of the irrigation season. The entire agricultural economy of this large body of land was dependent on a constant flow of water through the canal. (Spofford TR. *700.)*

Having a duty to plaintiffs and realizing the danger of damages resulting from failure of that duty a high degree of care was placed on defendant in the performance of its duty.

In Restatement (Torts, Section 284) we read:

> "Negligent conduct may be either:
> (a) An act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another, or
>
> (b) A failure to do an act which is necessary

for the protection or assistance of another and which the actor is under a duty to do.
Comment on Clause (a):

a. The actor, as a reasonable man, should realize that his act involves an unreasonable risk of causing an invasion of an interest of another, if a reasonable man knowing so much of the circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the existence of the risk and its unreasonable character. The conditions under which the actor should realize the existence and extent of the risk involved in his conduct are stated in Sec. 289 and 290. The considerations which determine whether such a risk is unreasonable are stated in Sec. 291 to 293."

The court found: (Finding 12, TR. 95)

"It was the duty of the defendant to exercise reasonable care in the operation of the North Canal to enable it to deliver water to the plaintiff(s) for irrigation purposes."

There was no finding that the defendant had met that burden.

The court also found: (Finding 13, (TR. 95)

"It was the duty of the defendant to exercise reasonable care at all times herein involved in the construction, operation, maintenance and repair of the North Canal including proper inspection and for all purposes pertinent in these cases. The plaintiff(s) failed to prove by a preponderance of the evidence that the defendant failed to exercise that degree of care."

If there was any inference or presumption that

defendant was free of negligence such presumption was overcome by the fact that its structure failed.

The cases cited supra are authority for the principle that when plaintiff established the duty to furnish water, and the failure to perform, a prima facie case was made.

Assuming that the res ipsa loquitur rule applies (notwithstanding the court's opinion to the contrary) or that a prima facie case had been made, there is then brought into plaintiffs case an inference of defendant's negligence. This inference is evidence under the provision of Section 2-401 O. C. L. A., therefore, there is evidence of defendant's negligence before the court both as a result of res ipsa loquitur, and the effect of the prima facie case, which casts a burden on the defendant to rebut.

True, the inference is disputable and can be overcome by other evidence, as could a prima facie case, but there must be evidence which does overcome the probative force of such inference or prima facie case. To merely disregard the inference, or the prima facie case, in the absence of proof to the contrary, would be capricious and arbitrary.

To the above extent there is a burden on the defendant whether it had pleaded an affirmative defense or not.

The defendant also had the burden of proving an adequate defense of its duty to deliver water in accordance with its duty to the plaintiff.

This court, in *Union Pac. R. Co. vs. Stanger*, 132 Fed. (2) 982, dealt with the probative force of an inference of negligence created by the res ipsa rule and upheld the trial court in following such inference against a fair persuasive amount of testimony of due care, and held that an inference created by the res ipsa rule does not go out of the case when defendants evidence is received, saying: (984)

> "We think this theory of res ipsa loquitur is premised faultily. The rule of res ipsa loquitur is not merely a rule of evidence shifting the burden of going forward with proof, for the inference of negligence under the rule does not disappear when met with substantial credible evidence of due care. It remains in the case throughout to be given consideration by the trier of fact in his weighing of the whole case with the burden of proof remaining with the plaintiff to the end." (Citing Sweeney vs. Erving 228 U.S. 233, 57 L.E. 815)

and then held that a review of the testimony failed to show that the trial court abused its discretion.

In a later case, *Union Pac.* vs. *DeVaney*, 162 Fed. (2) 24 this court said: (25-26)

> "Where the injury is the proximate result of a happening which would not ordinarily occur without negligence and the possession and control of the thing involved rests in a party certain, the lack of evidence as to negligence on the part of the injured person may be supplied by the doctrine of res ipsa loquitur, that is, the duty of going forward with proof in explanation of the happening moves to the party having the possession and control. In our case the

> company is under such duty. Appropriately we may add that the burden of proving this case always remains with plaintiff as, even with the aid of the doctrine, the plaintiff continues under the duty of convincing the fact finder that the injury resulted from negligence and the defendant was guilty of the negligence. We said in *Union Pacific Rd. Co.* v. *Stanger*, (9 Cir.), 132 F. 2d 982, 984, 'The rule of *res ipsa loquitur* is not merely a rule of evidence shifting the burden of going forward with proof, for the inference of negligence under the rule does not disappear when met with substantial credible evidence of due care. It remains in the case throughout to be given consideration by the trier of fact in his weighing of the whole case with the burden of proof remaining with the plaintiff to the end.'
>
> "It was the company's duty to fasten the trucks on the flat car securely, and it thereby failed in its duty to provide a reasonably safe and proper place for appellee to work. The car was in the exclusive possession and care of the company during all of the relevant time and the company was charged with the duty of keeping the truck fastened in such a way that it could not move about. The circumstances brought the doctrine of *res ipsa* into play."

Having established a prima case by showing the collapse of the canal, and the failure to deliver water and having the benefit of the res ipsa rule creating an inference of negligence the question arises: Was plaintiffs case overcome by defendant's evidence? The court failed to find that defendant used due care. A finding to this effect would be necessary to overcome plaintiff's case.

The court made no findings indicating that the defendant met the burden on either of these issues.

This brings into operation the rule that a failure to find on these affirmative issues constitutes a finding against the defendant. The rule is exemplified in the following cases.

THE COURT MADE NO FINDING WHICH EXONERATED DEFENDANT FOR BREACHING ITS CONTRACT DUTY TO DELIVER WATER OR TO MEET THE OTHER BURDENS ON DEFENDANT.

The defendant had the burden of proving a defense for failure to deliver water, as well as the burden of meeting the weight of the prima facie case established by plaintiff.

The court made no finding on this issue, and failure to do so is equivalent to a finding against the defendant. Out of the many authorities on this question we cite the following.

In *53 Am. Jur.* (Trials) P. 796, Section 1143, we read:

> "It has been said that if the Findings of Fact made by the trial court leave some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of proof."

Among the cases cited in support of the above text, is *Erie R. Co. vs. Callahan Co.* (Ind.) 184

N.E. 264, 87 A.L.R. 778, involving damages for alleged shipment of freight, where we read: (780 A. L. R. Cit.)

> "The court having found that completion of the shipment was delayed in unreasonable time, the burden was upon appellant to show that the delay was not caused by its negligence, and a failure to find any fact on the subject is a finding against appellant. (Citing several cases)

In *64 C. J.* p. 1236, we read:

> "An omission of the finding to cover a particular fact or issue is to be deemed a finding on the fact or issue against the party having the burden of proof."

The rule is followed in the recent case of *Burlington Transportation Co. vs. Wilson* (Nev.) 114 P. (2) 1094 where we read: (1095)

> "The burden of proving that respondent's car was parked on the wrong side of the road was on appellant, and the existence of this fact was necessary to establish appellants defense of contributory negligence. The findings being silent as to this fact, the presumption is that it did not exist."

In *Ingle vs. Ingle* (Wash) 48 Pac. (2) 576 we read: (577)

> "It is first contended by appellant that the action is barred by the statute of limitations. Appellant set up the statute of limitations by way of affirmative defense. The court made no finding on the issue so tendered. The rule sup-

ported by the weight of authority is that, where the findings of fact are silent upon a material point, it is deemed to be found against the one having the burden of proof." (Citing authority)

The duty of meeting the burden of proof creates the same burden as though the exculpatory facts were affirmatively alleged, hence calls for a finding on whether or not defendant met the burden and the absence of such finding is to be considered as a finding against defendant.

THE JUDGMENT DISMISSING PLAINTIFFS CASES IS CONTRARY TO THE LAW AND TO THE EVIDENCE AND THEREFORE CLEARLY ERRONEOUS

We point to the following specifications of evidence in support:

1. Plaintiffs cause of action is based on defendant's failure to deliver water for irrigation. It is plainly so stated in the complaint. Proof of the contract and its breach made a prima facie case. The court considered the case on the basis of a pure tort and placed the burden of proving negligence on the plaintiff.

2. Plaintiff proved, the defendant admitted, and there is no dispute concerning the fact that defendant constructed the North Canal over a porous terrain, that the soil was incapable of holding water,

that the canal was unlined, and as a result absorbed water to the point of breaking.

This constitutes negligence in Oregon as well as every other jurisdiction where the issue has been passed on.

3. Defendant's inspection of the North Canal was wholly inadequate to justify an inference, or finding of due care in this respect.

4. It is admitted that there was a total lack of any inspection of the North Canal, after the first break and prior to the second break, and that an inspection would have disclosed the dangerous condition of that segment, which broke almost immediately when water was turned into the canal.

5. Plaintiff proved and the record demonstrates that an excessive amount of water was turned into the canal prior to its complete repair and while the bed of the canal was still several feet below normal grade at the point where the second break occurred.

On these essential points there is no conflict in the evidence. Any finding of fact contrary to these is clearly erroneous.

6. The court erred as a matter of law in failing to apply the rule of res ipsa loquitur to the facts of this case and to place the burden on defendant of proving the reason of defendant's failure to perform its contractural duty to deliver water.

THE COURT ERRED IN FINDING THAT

CLAIMANT FAILED TO ESTABLISH THAT DEFENDANT DID NOT USE REASONABLE CARE IN THE CONSTRUCTION, MAINTENANCE, OPERATION, INSPECTION OR REPAIR OF SAID CANAL. (Finding No. 18)

On these cardinal elements of negligence, there is no dispute in the facts, viz: There is no dispute that (1) because of the nature of the stratum over which the canal was built, the water leaked through the canal (either the bottom or bottom and sides) causing a saturated condition which would not sustain the canal.

(2) Or that no adequate core wall was constructed in the canal bank.

(3) Or that no inspection was made at the point of the break to determine the presence of leaks and seepage below the canal.

(4) Or as to the manner in which, or the amount of water, turned into canal prior to the second break.

(5) Or to the unfinished condition of the canal at the time this water was turned in.

(6) Or that there was no inspection of the condition of the segment of the canal that broke the second time.

On the above issues, there is no question of preponderance. The evidence points directly to negli-

gence, without contradiction and is based largely on the testimony of defendant's witnesses.

So far as any inference which the court might draw from the testimony, we suggest that none of the claimants witnesses have filed a claim for damage in the proceeding and are wholly disinterested, that their testimony was positive and affirmative, while the defendant's witnesses (with exception of Mr. Clours who operated a tractor) were all employees of the defendant and charged with the safety of the canal. Their testimony on the issue of negligence was wholly negative. They simply say they did not see what claimants witnesses positively assert was present.

A failure to find negligence on this record is to arbitrarily ignore the probative force of the uncontradicted evidence.

In *United States vs. United States Gypsum Company*, 333 U.S. 364, 92 L. E. 746, the Supreme Court reviewed the record, and in reversing a judgment of dismissal said: (766)

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In that case the government had the burden of proving a conspiracy in restraint of trade and although there was positive oral testimony to support

the trial court's findings (which is lacking here) the Supreme Court had no difficulty finding them against the weight of the evidence and erroneous.

In *George vs. Capital Tractor Co.*, 54 App. D. C. 295 Fed. 965, the trial court granted a judgment in favor of the defendant Tractor Company. In reversing, the Circuit Court of Appeals for the District of Columbia, after reviewing the facts, said: (968)

> "The uncontradicted and unimpeached testimony in the case discloses no negligence on the part of the plaintiff, and proves at least prima facie that negligence of defendant's motorman was the direct and immediate cause of the collision."

After recognition of the rule in cases of serious conflict in the testimony the court continued: (968)

> "But where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

This Court in *Smith vs. Royal Ins. Co. Ltd.* 125 Fed. (2) 222, in setting aside findings and directing a judgment for appellant said:

> "The bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute. Accordingly the finding of falsity does not command the strong presumption of verity which usually attends a finding. (Citing authority) The doubtful situation should have been resolved against the party upon whom rested the burden of proof."

So here, there being no conflict in the material testimony, and the decision being based upon an erroneous theory of the law, the findings are not conclusive upon the claimants who are asking for review.

THE TRIAL COURT'S OBSERVATIONS AND INFERENCES ARE CONTRARY TO THE EVIDENCE.

Throughout the Court's opinion (TR. 63-68, 93 Fed. Supp. 779) are many observations and expressions of opinion which are contrary to the facts. The inferences which the court drew are unwarranted and have no reasonable foundation in the record.

In addition to the inconsistent inferences discussed supra (pp. 55, 61) we point to the following: (TR. 65 et seq., 93 Fed. Supp. 783)

> "A careful examination of the evidence shows that the cause of the break was never established, and remains conjectural."

Under the *res ipsa* rule plaintiffs would not be required to prove the cause of the breaks. However, we did prove facts from which the only logical inference could be that the canal banks or bottom, and it doesn't matter which, became so water soaked that they gave way.

More than that, Mr. Gordon, Mr. Carter, Mr. Newell and Mr. Spofford, of defendant's staff of engineers, testified as experts on this point and epitomized their observations in statements of which the following from Mr. Gordon's is typical.

> "A. I think the cause of the first break was very similar to the cause of the second break, which I observed, in that a stratum located at some depth below the bottom grade of the canal actually failed structurally. By that I mean it collapsed, it lost its homogeneity, it broke down structurally.
>
> Q. And what was the cause of its breaking down, in your opinion?
>
> A. I believe the introduction of seepage through the bottom of the canal and through broken joints had allowed the stratum to saturate, and it was in places, the point of the breaks, under full flotation, completely lubricated, and without sufficient internal structure to resist the load that was placed on it."

Surely, there is nothing conjectural in this very plain testimony. It is the direct result of cause and effect.

Again TR. 66, 93 Fed. Supp. 784 in discrediting

the effect of the water logged condition immediately below the point of the break, the court said:

> "This latter testimony, in the opinion of the court was quite weak. The court was not convinced that any observed conditions referred to did not come from surface water. Nor is great weight to be given testimony concerning the miring of a tractor and a wet condition of soil in the field immediately below the place where the break subsequently happened. The water in the lateral of the farm within a few feet from the toe of the canal bank was, in our opinion, casual. It was either surface water or rain. *As a matter of fact at the time this water showed up, the canal had no water in it since the stream had not yet been required for irrigation.* (our italics) * * * Experience in the irrigation country does not indicate that such circumstances would be taken as indications that a break was going to occur in the main canal."

This thinking is contrary to the opinions of the experienced engineers called by defendant who testified that such circumstances gave cause for alarm. (Carter TR. 579-580, App. 156-7, Newell TR. 507, App. 155)

The fact that these indications showed up before the irrigation season began, only accentuates the fact that a large amount of water was reservoired in the water soaked banks of the canal. In fact under those conditions, when the canal had been empty since the close of the previous irrigation season, the only logical conclusion or inference to be drawn was that the canal had leaked so thoroughly

that this reservoir was created, which was conclusively proved when the engineers finally tested the bank which remained standing after the second break.

Again, we read in the opinion. (TR. 69, 93 Fed. Supp. 779, at p. 785)

> "At that time (after first break) no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered."

To the contrary, in repairing the first break, porous structures were discovered three to four feet in thickness, Exhibit 80, reveal the same structures in the upper canal back some three hundred feet up and down the canal bank and the repair revealed that no core wall had been placed in the canal bank.

In his opinion, the trial Court alludes to the duty of the land owners to report the condition which they observed, in the Shaw field, and on the Hust ranch. We read (TR. 67, 68, 93 F. Supp) at p. 784:

> "Certainly, these springs were well known to the whole country side, and, if anyone had believed that they were a source of peril, the matter would have been taken up in protest by the landowners on whose property these appeared and other irrigators who depended on the canal for their crops.
>
> * * *
>
> "The farmers themselves, in an irrigation coun-

> try, are concerned with the maintenance of the main canal, and, if there were any such circumstances which would call attention to the ordinary man the fact that the canal was apt to break, they unquestionably would have been reported to the Government and we would have had testimony that such warnings were given. There is no such testimony in the record. There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break because of the circumstances mentioned. The Court holds that the absence of ordinary care in this respect has not been demonstrated by this showing.
>
> "The next question is as to the competency of the inspection. It is not contended that there was no inspection. This, of course, would have been contrary to fact."

Of course, the defendant's irrigation manager (Spofford), General superintendent (Newell), Engineer (Carter) and ditch rider (Pettet) had known all about the leaks 300 feet north of the break, and the leak on the Hust field for some three or four years, and did nothing about them. Why should a farmer become alarmed over a further leak on the Shaw place if these officers of defendant could see no danger in more pronounced danger spots? Besides there was no duty on the farmers to give further warning.

We read in *65 C.J.S.* p. 598, Section 89:

> "A person who had nothing to do with putting into operation or continuing in operation the dangerous agency is under no duty to warn another of approaching or impending danger."

At another point in his opinion the Court apparently dismissed the necessity of anticipating danger because the structure had stood intact at this point since 1936, when it was built. We read: (TR. 65)

> "A great quantity of water has flown over the dam and through the Owyhee Canal since construction. The Court is of opinion that the canal itself built up a protective covering over these structures, which was only gradually permeated by water. We hold that eleven years of use of this canal would lead persons charged with only the duty of ordinary care to believe that the construction was proper and that the canal would hold a full head of water over irrigation season in the absence of other circumstances tending to destroy that belief."

The effect of this reasoning is directly contrary to the testimony of defendant's engineers and experts which indicates that percolation and seepage through the canal bed and bank might have been slow and over a long period of time.

Mr. Carter, defendant's witness and engineer, testified that percolation through the walls of the canal might have taken years. In describing what the action of percolating water would be he stated that it might take a long time to bring the result that happened. (TR. 569).

Mr. Senger, defendant's expert witness, testified: (TR. 780)

> " * * * We had a failure in a canal on the Idaho

> Power Company systems, when the thing had been operating twenty years."

The fact (alluded to by the Court (TR. *65*, 93 Fed. Supp. 784) that the canal had been in operation for eleven years before it failed is no evidence of proper construction.

In *65 C.J.S.* p. 1081, Section 243 we read:

> "Where a building falls of its own weight without any external violence, the fact that it has stood for a number of years without falling is very slight evidence that it was properly constructed and of suitable material."

The editors cite *Waterhouse vs. Joseph Schlitz Brewing Co.* (S. Dak.) 81 N.W. 725, 48 L.R.A. 157 where we read: (727 N.W. Cit)

> "The contention of appellant that the statement in the complaint that the building had been owned and used by the defendant for more than 10 years tends to contradict the statement that the building was negligently and improperly constructed, is not tenable. From the fact that the building fell of its own weight, without any external violence, a fair presumption would be that the fall occurred through adequate causes, one of the most natural of which would be the negligent and faulty construction of the building itself. The fact, therefore, that it had stood for a number of years without falling, would afford very slight evidence that it had been properly constructed, and of suitable material."

CONCLUSION

We apologize for the extent of this brief. However, the record presents numerous questions involving the duties of water serving agencies which are of utmost importance to the Government in this case and to every other agency engaged in that service. Likewise, every water user, both on Government projects and in irrigation districts, is vitally interested in the principles which we have attempted to discuss.

The economic welfare of many thousands of water users, who spend generations of time and vast sums of money in repaying the construction costs and operation and maintenance expense, should be protected against the failure to receive the water contracted and paid for.

It may be anticipated that similar controversies may arise, under the present Federal statutes, and that a comprehensive decision of the issues involved here will clarify the rights, duties and obligations of the parties involved.

It is hoped that these considerations may justify the extent and scope of this brief.

Respectfully submitted,

P. J. GALLAGHER,
MARTIN P. GALLAGHER,
Attorneys for Appellants.

APPENDIX TO APPELLANTS BRIEF

In an attempt to aid the court we have set out in black face type the page number of the record where the quoted testimony is referred to.

TR. 301

A. C. Merritt, plaintiffs witness, testified:

"The formation, as generally accepted by geologists, is a very old formation of lakebed and windblown rocks, laid down by water, eroded by wind and laid down again."

And: (Tr. 310)

Q. What is the nature of that stratum in (exhibit) 73 which shows the break?"

* * *

A. That is a very soft sand formation, sandy.

Q. Any other ingredient in it?

A. Well, there is some very soft sandstone involved in it that is pretty well broken up, as at a point indicated opposite the leveling rod, at this point. (Indicating)

Q. Were you able to determine the thickness or depth of that stratum as shown in No. 73?

A. It would be very difficult to determine the exact thickness, because it varies at different points, but I would say the average thickness might be from two to four feet.

TR. 340

A hypothetical question was propounded to both Mr. Merritt and Mr. Bouton, as to their opinion of the cause of the break, to which Mr. Merritt answered. (TR. 343)

TR. 343

" * * * that the canal was dug through a pervious stratum and that stratum continued to absorb water over a period of years until it became saturated and somewhat in a liquid state and in that condition would not support the bank that was built on the slope of the hillside where the canal cut through."

TR. 426

Mr. Bouton answered: (TR. 426)

"Thoroughly saturating that bank below through that pervious material caused the bank to give way. There was nothing there to stabilize it. Naturally, when it became thoroughly saturated something had to give and the bank went out."

TR. 414

This witness further testified (TR. 414) that he examined the stratum shown in Exhibit No. 73.

"Did you pay any particular attention to the formations found in the photographs, shown by Exhibit No. 73, for instance?

* * *

A. Yes; I came down the canal at the time Mr. Bronken was standing there with the rod.

Q. Did you make any personal examination of the stratum that is shown there near where Mr. Bronken is?

A. Yes, in that it is a very porous formation."

TR. 121

Mr. Paul Bronken testified on redirect examination. (TR. 121)

"You spoke about the outcropping of this porous area being in the bed of the canal. Does the exhibit that delineates that—which is it? Eighty-one?

A. Both 80 and 81 do.

Q. Well, does 80 show about the proper location of that porous structure in the canal bed and on the opposite bank, the upper bank?

A. Yes, sir."

And was recalled by plaintiff and he testified: (TR. 446)

"My opinion is that when the water enters this pervious formation as shown on Exhibit 80, it is on an incline toward the valley. In other words, as water enters there you are going to get a hydrostatic head that will keep pushing the water through the formation, and since you have a source of water there is no reason to believe that in time it won't completely fill until it crops out someplace and comes out on the surface.

Q. In other words, it would follow on down

this pervious structure until it found an outcropping where it could get out?

A. Yes, until it found some weakness where it could free itself.

Q. Did you find in that vicinity any spots where the water is coming up at the present time?

A. Yes, sir. The most prominent one is to the south of the break, in a neighboring field there. We observed a flow of water there coming out of the middle of the field. I would imagine it is about, oh, somewhere between a hundred and a hundred and twenty-five feet down the slope from the toe of the canal bank. It just bubbles right out of the ground there."

TR. 702

Mr. Spofford, defendant's witness, testified: (TR. 702)

"I am no geologist, and the—the canal, I would say, was through this formation—some call it the Payette formation, or Idaho formation. It is strata of fresh water deposits of various natures."

TR. 571

Mr. Carter, defendant's witness, testified: (TR. 571) on direct examination.

"Q. And now would you continue with your statement as to the premise upon which your opinion is, and your opinion as to the cause of the break?

A. What I believe happened is that water seeping down through the bottom of the canal

over a period of time, whether long or short I don't know, but eventually enough water found its way into this bottom stratum to saturate it, cause it to lose its stability, its ability to withstand weight or pressure, probably getting into almost a fluid state, in which condition it gave away and the canal bank went with it."

TR. 618

Mr. Gordon, a witness for defendant, and an engineer who was in charge of the repair of both breaks testified. (TR. 618)

"Q. I will ask you this question: What, in your opinion, from your experience as an engineer and your observations here and your own work in the bottom of that canal, was the cause of the first break?

A. I think the cause of the first break was very similar to the cause of the second break, which I observed, in that a stratum located at some depth below the bottom grade of the canal actually failed structurally. By that I mean it collapsed, it lost its homogeneity, it broke down structurally.

Q. And what was the cause of it breaking down, in your opinion?

A. I believe the introduction of seepage through the bottom of the canal and through broken joints had allowed the stratum to saturate, and it was in places, the points of the breaks, under full flotation, completely lubricated, and without sufficient internal structure to resist the load that was placed on it.

Q. And what was, in your opinion, the cause of the second break?

A. I think it failed in the manner I have described, similar to the one I have described, by the failure of the stratum below the bottom grade of the canal, which collapsed, allowed the bank to move out and down."

TR. 668

On cross-examination this witness testified: (Tr. 668)

"Q. All right, what was your conclusion as to what caused the first break that you arrived at at the time you fixed it?

A. I concluded that it might have failed by failure along some joint in the underlying stratum. I couldn't find such a joint by examination up and down the stream, but that was the best conclusion I could draw at that time.

Q. And then when you went on to repair the second break you changed your conclusion you had arrived at at the time of the first break?

A. I watched the second break. I was standing right at it.

Q. And your conclusion now is that both breaks were caused by the giving way of the stratum at the canal bank?

A. I think the causes were very similar."

TR. 511-512

Mr. R. J. Newell, defendant's witness testified on cross-examination: (TR. 511-512)

"A. I believe that the first break was caused

by a condition below the bottom of the canal under the outside bank.

Q. All right, will you describe the condition you think existed there?

A. There must have been a stratum of material that when saturated lost its stability and ability to hold up the canal bank.

Q. All right, where would the water come from that saturated that segment?

A. Down through cracks in the intervening layer between the bottom of the canal and this particular stratum.

Q. That is, you are now assuming that there was a porous stratum underlying the bed of the canal?

A. I get tangled up with the term "porous," but there was a weak stratum under there which, when saturated, would not support the bank.

Q. All right; and why would it be weak? If you don't like the word "porous," why would it be weak?

A. On account of the character of the material itself that was not sufficiently stable when saturated.

Q. When saturated. And where, again, would the water come from to saturate it?

A. Down through cracks or crevices in the bottom of the canal."

TR. 215-220

Mr. Percey, plaintiff's witness, testified: (Tr. 215-220)

(TR. 215)

"Q. What, generally, were your instructions, Mr. Percy?

A. Well, they sent me and Tom in the morning to get some water to fill this cofferdam, and, of course, the laterals were open and that didn't come up, and so they sent us up to get it so that they could use some of the water on that fill.

* * *

Q. And what time of the day did you start out to get this water down?

A. Well, it was around four o'clock, I would say.

Q. Four o'clock in the afternoon?

A. Yes.

Q. At that time were they still working on building up the embankment?

A. Oh, yes, yes." * * *

(TR. 216-220)

"Q. How many of those sack dams were there in the ditch (130) between the break and, say, Sheep Creek siphon?

A. Well, if I remember right, there was four or five.

Q. And how many gates were there between the break and Sheep Creek siphon?

A. Well, that is—I couldn't say for sure, but I imagine about eight or ten, somewhere along in there.

Q. And what did you do towards closing the gates?

A. We just shut them all down and locked them.

Q. And did you take out these temporary dams that were in there?

A. No.

Q. They were left in?

A. We left them in.

Q. Now, will you describe for the record just what Sheep Creek siphon is?

A. Well, it is just a big check right at the head of the pipe.

* * *

Q. Does that siphon carry the entire flow of the North Canal across the Sheepshead Creek (sic)?

A. Oh, yes.

Q. Now, was there anything done at the upper end of the Sheep Creek Siphon to stop the flow of water?

A. Yes, there were some checks in there.

Q. Just what were they? What was the nature of those checks?

A. They were 4 by 6 timbers, if I remember right.

Q. Were they placed across the face of the siphon?

A. Crossways, whatever the check is.

Q. And were those checks in there when you and Mr. Kuhnley and Mr. Pettet got up there?

A. Yes.

Q. How much of the water, of the flow of the canal, was held back by the checks in Sheep Creek siphon?

A. Well, I don't know, I have never had too much experience above there, but it was quite a body of water; it went back up quite a long ways.

Q. Was the ditch pretty well filled above Sheep Creek?

A. Well, yes, it was up pretty well, you know. Of course, they had Sheep Creek checked pretty high, you see, and it was filled up pretty high.

Q. And when you say 'filled up pretty high' you mean the check boards were up pretty well toward the top?

A. Well, pretty well, yes.

Q. What did you do towards releasing the water that was backed up by these boards?

A. Well, we pulled the checks out.

Q. When you say 'checks' do you mean—

A. We pulled the planks out, you see, check boards.

Q. Did that release the volume of the water that was held back, then?

A. Oh, yes.

Q. And how many of the check boards did you pull out?

A. If I remember right, it was four.

Q. How far down did that release the water from the head of the siphon?

A. Well, I would say about two feet and a half, something like that.

Q. All right, then how far is it from the head of the siphon up to the Lockett Spillway?

A. Oh, I would say around three miles, something like that.

Q. Did you notice the amount of water that was in the canal between those two points as you were going up the stream, the canal?

A. Well, I didn't pay no great lot of attention to it, no. It was a pretty fair head of water. It was checked so, you know, so that you couldn't really tell what the flow of it was.

Q. No, I was asking the volume of water in the ditch. Was the ditch pretty full?

A. Well, no, I wouldn't say awfully full. I would say it looked and viewed to be up to normal.

Q. What is the apparatus in the ditch at Lockett Gulch which controls the flow of water in the ditch?

A. Well, I don't know just how to explain it. They are maintained on a wheel, on a headgate, you know. You maintain your steel gates.

Q. Steel gates across the canal?

A. Yes.

Q. And how many of those gates are there?

A. Two.

Q. Side by side?

A. Yes.

Q. And does that control the flow of the water down the canal?

A. Uh huh, I think it does.

* * *

Q. When you got to Lockett Gulch, Mr. Percy, how far open were the gates?

A. Well, I would say about two feet. They open from the bottom up, you know.

Q. From the bottom up to the gate was about two feet?

A. Uh huh.

Q. Do you know how wide across those gates are?

A. No, I don't. About eight or ten feet, though, the others are, I think.

Q. What was done towards opening the gates any further?

A. Well, Tom opened one and I opened the other one.

Q. How far did you open them up?

A. Oh, I would say we raised them about two feet.

Q. That would make the total clearance under the gate four feet?

A. Yes, somewhere in there.

Q. Did you observe the amount of water that was released and going down the ditch after the gates were open?

A. Well, no, I really didn't. You know, I had never seen that particular ditch. It is pretty hard to guess on a ditch you have never seen under pressure, you see.

Q. Was that water under pressure under the gates, coming out?

A. Oh, yes."

TR. 150-151

Mr. Hawkins, plaintiffs witness, testified on direct examination: (Tr. 150)

"A. Well, we had just arrived home, between six and seven o'clock, or I would say about—I wouldn't say exactly, but we had come home from our work and I imagine it was between six and seven o'clock, we were just starting out, and we heard a noise, looked out,

and someone said, 'There water comes over the canal again,' and we started to run; we run up there as fast as we could.

Q. What was the condition that you found, when you got there, as to the water?

A. The water was running full length over the fill that they had put in.

Q. And over how long an area?

A. Approximately fifty feet, fifty or sixty feet.

Q. In other words, they had got fifty or sixty feet of canal built and the water was running over that bank?

A. It was all on a level, as near as I remember.

Q. You mean the water and the bank?

A. Yes, and the water was coming directly over the bank.

Q. How high, if you know, was the new bank built up to, or could you tell?

A. Couldn't tell exactly.

Q. Well, how long did you stay there?

A. Oh, approximately an hour and a half.

Q. And did the water continue to run over the new fill while you were there?

A. That is right.

Q. Was it still running over when you left?

A. Yes.

Q. And about what hour would you say that you left there that evening?

A. Nearly dark."

TR. 680

Mr. Gordon, cross-examination: (TR. 680)

"The Court: Now, if you had been trying to be sure that this break would not have occurred you would have then made the experiment that you subsequently made; that is, you would have put your dragline down to see what was below in a place beyond the break on each side? That is what you subsequently did.

A. That is right. I don't know if this is proper. Could I explain that a bit?

The Court: Yes.

A. The first break we had no evidence that upstream or downstream we had any unsoundness. That canal bank had stood for twelve years and, to the best of my judgment, if I could put a patch in there that would hold the canal should go on serving. At the end of the second break I realized that I had missed something the first time and that there was not going to be any run-around on the second time, I can assure you. The evidence was not there, even in the second break, that I could point to and say that 'this is what caused it,' but I wanted to be sure and I was not going to be embarrassed again by another break, so I instructed that dragline to dig in there and dig deep to see if I was again missing the point, and immediately ran into the reason."

TR. 646-647

"Q. And at that time the bottom of the canal at its deepest place was three feet below the normal surface?

A. Approximately.

Q. And a more or less distance below for the entire length of the break?

A. That is right. The silt was not in itself sufficient material to complete the repair in the bottom of the canal.

Q. What were you going to do then?

A. We were going to blanket that with pit-run gravel.

Q. But you hadn't got around to working at that yet?

A. Well, that was a question of getting delivery fast enough at that point, and we planned to put the gravel on during operation.

Q. But no gravel had been put into the bed of the canal before the water was turned in?

A. No, sir.

Q. And that, you say, was about 8:00 o'clock Wednesday evening?

A. That is correct.

Q. Now, that area where the ditch bed was still below surface, would that extend far enough north to be opposite where the second break took place?

A. Yes. Not at the full three-foot depth, though.

Q. No, no, I appreciate that. Then for an area three hundred fifty feet above the break and a hundred to a hundred and fifty feet below the break the ditch bed was exposed and not brought back to level at the time you turned the water in Wednesday evening?

A. I will agree it was not back to level. I don't quite understand what you mean by exposed."

TR. 643-644-645

"Q. Now, as I understand your testimony, the entire bed of this canal was either washed away or washed down very low, both sides of the first break?

A. There was considerable erosion, yes, sir.

Q. How far upstream did the eroded surface end?

A. Approximately three hundred fifty feet.

Q. Would that be about where the cofferdam was?

A. That is correct.

Q. Then from the cofferdam on down to the break it had eroded down to where it had reached a depth of some seven feet below the normal bottom of the bank?

A. That is right, about the line of the inner toe of the bank.

Q. And it had eroded also on the downstream side?

A. That is correct, but to a lesser extent.

Q. That was because of the water running back?

A. That is correct.

Q. And what area of the bottom of the canal showed that erosion, for what distance up and down the canal?

A. Well, it wasn't uniform completely across the width of the canal.

Q. I appreciate that, but for what distance up and down the canal? Three hundred and fifty feet from the upper end, and how far down below?

A. Oh, I would think about one hundred fifty feet—about one hundred feet, I would say.

Q. That would be approximately four hundred fifty feet?

A. That is correct.

Q. Now, in making your repair, and after you got your key wall in, had you finished that work before the water was turned in?

A. I don't understand you. Finished what work?

Q. The raising of the bottom of the canal up to grade?

A. No, sir, we hadn't intended to finish it. We had—

Q. The bottom of the canal hadn't been raised up to grade before you turned the water in?

A. That is correct.

Q. How far below the bottom of the grade do you think it was, Mr. Gordon?

A. Well, that was a varying proposition. I think the maximum was about between three and four feet.

Q. And then it would feather out toward either end?

A. That is right."

TR. 704

Mr. Spofford testified:

"Well, in this trip in the morning they thought they had turned down the right amount and in the afternoon the water hadn't reached the place so the instructions were given for the man to go up the canal and turn down more water.

* * *

The second time the men went up for more water they stated that they took several sacks out of this dam and they proceeded up the canal and lowered two more gates turning more water into the canal."

TR. 238

Mr. Terhune, plaintiffs witness, testified on direct examination: (TR. 238)

"Q. From that section of the break down to the cofferdam did you find any evidence of a

core or core wall of any sort to the original ditch?

A. No, there was no evidence of any core being used whatsoever in the bank and showing in the break."

TR. 277

On cross examination this witness testified: (TR. 277)

"Q. You made some statement relative to that you had not observed any evidence of core in the bank. What did you mean by that?

A. There was no indication, when we started the excavation for the core bank in the sandstone material, that there had ever been a core bank there before in any part of it, because we cored back beyond the washes on each side."

TR. 609

Mr. Gordon, defendant's witness, testified:

"A. There was a flow of water about an inch deep, from one to two inches deep, over a portion of the patch.

Mr. Hess. Q. What portion would that be?

A. It was the downstream, the extreme downstream portion of the patch was overtopped first. That flow of water washed about three inches of loose material from the top of our patch. That was material which could not be normally compacted by the operation of our equipment. There was only a certain amount of loose material on top."

TR. 253-257-258-259

M. Terhune, plaintiffs witness, testified:

"Q. It didn't carry the water?

A. It didn't carry the water.

Q. What happened?

A. It went over the top of the place where we were clearing. * * *

Q. To what depth did the water go over—

A. I would say to a depth of about three to four inches."

* * * (257)

"Q. Now, after Mr. Clower's outfit had endeavored to stop the flow of water by spreading earth on top of the fill did he have any success in stopping the water with that operation?

A. No, sir, he did not.

Q. What then did he do?

A. They went up to the cofferdam and started to plug that back so that we would have a cofferdam across and shut the flow of water off."

* * * (258)

"Q. Then what became of the water on the downstream side of this plug?

A. It continued to flow over the bank for quite some little time until that point of the operation is where my rig got back up on top and the two of us started to building the dike up, which we soon had it stopped going over the top."

* * * (259)

"Q. How long after he had plugged the canal did the water continue to run over the fill at the point of the subsequent break?

A. I don't believe it continued to run over more than an hour afterwards, if quite that long."

TR. 658-59

Mr. Gordon testified:

"Q. * * * Now, when you started to clear away the debris from the second break how far back were those banks entirely water-soaked? You spoke something about it being a sort of a loblolly that you ran into there.

A. Well, I testified that the inner face of the outer bank was soaked for a distance of about two feet. The wettest stratum we found was the one below the bottom grade of the canal. That had very little structure.

Q. By that you mean it was almost fluid mud?

A. That is right. A slight disturbance would just break it down completely. If you kicked it with your foot it would collapse, it would break down into almost quick sand."

* * * (659)

"Q. Now, were you familiar with the fact, or the alleged fact, that the ditch was leaking, or that there was evidence of water rising—I will put it that way,—in the Shaw field for the whole distance under both of these breaks?

A. I don't know just how to answer that question. I heard the testimony to that effect but I don't believe it.

Q. I see. Well, if those are the facts, wouldn't that indicate that there was seepage getting through the canal walls there, either below or above the water line, or above or below the bottom line of the ditch?

A. Well, I think we could agree that if there was seepage there must be a seepage somewhere, yes, sir.

Q. Yes; and you will also agree, won't you, that if there was seepage that it was coming from a water supply, a water source?

A. I think that is correct, yes, sir.

Q. And you will go one step further and say that it had to come out of the ditch, won't you?

A. I think in large part."

TR. 616-46-47-48

"Q. And you were not through and had not completed, as we understand your testimony, your first repair when this blowout happened below that where you were repairing and doing that work?

A. That is correct. The operation was still going along as fast as we could prosecute it."

* * * (646)

"Q. And at that time the bottom of the canal at its deepest place was three feet below the normal surface?

A. Approximately.

Q. And a more or less distance below for the entire length of the break?

A. That is right. The silt was not in itself sufficient material to complete the repair in the bottom of the canal.

Q. What were you going to do then?

A. We were going to blanket that with pit-run gravel.

Q. But you hadn't got around to working at that yet?

A. Well, that was a question of getting delivery fast enough at that point, and we planned to put the gravel on during operation.

Q. But no gravel had been put into the bed of the canal before the water was turned in?

A. No, sir.

Q. And that, you say, was about 8:00 o'clock Wednesday evening?

A. That is correct.

Q. Now, that area where the ditch bed was

still below surface, would that extend far enough north to be opposite where the second break took place?

A. Yes. Not at the full three-foot depth, though.

Q. No, no, I appreciate that. Then for an area three hundred fifty feet above the break and a hundred to a hundred and fifty feet below the break the ditch bed was exposed and not brought back to level at the time you turned the water in Wednesday evening?

A. I will agree it was not back to level. I don't quite understand what you mean by exposed." * * * (648)

"Q. Well, as a matter of fact, twenty second-feet wouldn't have run over the bank of the canal?

A. Well, you must remember that when I cut the cofferdam I had to release the water that was stored behind the cofferdam also.

Q. I understand; and that would have caused a flow of more than twenty second-feet?

A. That is correct."

Q. And, as a matter of fact, it would have caused a flow big enough to run over the embankment?

A. That is correct."

TR. 245-46

Mr. Terhune testified:

"Q. Are you able to state about the height

to which the fill had been raised at the time the water went over it?

A. No, that is pretty hard to say exactly where the fill was at the time the water went over, because we had—The bottom of the ditch, if it had stood when we brought the grade up, was much lower than the bottom of the ditch as it should have been. We had a bank approximately ten or twelve feet up above the bottom of the ditch at that time.

Q. And, as I understand, you are unable to state how the bottom of the ditch as it stood then compared with the bottom of the normal grade of the canal?

A. No, it would have been hard to have said where the bottom grade of the canal should have been.

Q. Was the bottom of the canal there higher or lower than the normal grade?

A. It was lower, much lower, than the normal grade would have been of the bottom.

Q. Would you be able to make an estimate of the number of feet lower?

A. Well, not accurately, but I would say it was at least two or three feet below, anyway, the bottom grade—that is, the true bottom grade of the canal as it should be."

TR. 497

Mr. Newell testified on cross-examination:

"Then there is testimony, also, that the ditch broke just ten or fifteen feet north of where they terminated the core wall and broke the old bank wall. You heard that, too?

A. I heard that.

Q. Have you arrived at any conclusion as to whether the break was caused by water running over the new fill or by the fact that they did not extend the core wall up far enough north when they made their first repair?

A. I have an opinion that it was not caused by the overflow but that the repair did not reach far enough downstream in the first case.

Q. That is your opinion now, that that is what may have caused the second break?

A. Yes, sir."

TR. 677

Mr. Gordon, defendant's witness on cross examination:

"Q. Just one question, Mr. Gordon: After you had made this first repair did you carry out any experimentations, like drilling in the base of the canal, to determine whether or not there was a similar stratum down where the second break took place?

A. After the first repair?

Q. Yes.

A. No, sir."

The Court interrogated Mr. Gordon. (TR. 678-679)

"Q. * * * A competent engineer would have found out what the trouble was, or have done the best he could to find out?

A. I would think so.

Q. The Court: As a matter of fact, you can find out, can't you?

A. We certainly try. Sometimes we miss, but we usually do.

The Court: If a competent engineer was trying to put in a structure that he knew would stand, he would find out what was there, wouldn't he?

A. Yes, sir. * * * (682)

The Court: * * * You know that this seepage is down in the Hust field?

A. Yes, sir.

The Court: And you don't know where it comes from?

A. That is correct.

The Court: And you know that there is some seepage to the north?

A. Yes, sir.

The Court: And you don't know where that comes from?

A. No, sir.

The Court: Have you missed something again?"

TR. 578-79

Mr. Carter, one of the defendant's witnesses and engineers testified on cross-examination:

"Q. You state that the second break was caused from the same reasons that the first break was caused, which was the result of saturation of materials in the bank. Couldn't that have been determined by testing the materials before repair following the first break?

A. Yes, sir, it could have been.

Q. And it was not?

A. But it was not, that is right."

TR. 689-90

Mr. Spofford testified:

"Q. Would you state, particularly with reference to the North Canal, what security measures have you taken that it is properly maintained?

A. In the operation of a canal the size of the North Canal, which carries 1100 second-feet at the head, in my organization instructions are given to the three watermasters and the ditch riders to use extreme care in patrolling these canals during the irrigation season especially to look for new leaks or seepage.

Q. What are the duties of your ditch riders?

A. The ditch rider, during the irrigation season, which constitutes about seven months of the year, rides a section—in this particular

reach of the North Canal rides the main canal between certain points, and also delivers water to a certain number of water users. Usually they serve about 3,000 acres under each beat or ride.

Q. Was there a ditch rider responsible for the area of canal in this segment?

A. That is right.

Q. And his duties—would you just state briefly what he did along that line?

A. His duties were to ride this section of the North Canal from the intake of the Malheur Siphon up the canal to what is known as North Canal 33.1 lateral, which is some three miles above the break. He rides this ditch every day, seven days a week.

Q. And what are his instructions if he encounters anything which might appear to endanger the canal?

A. His instructions are to always watch for leaks and seeps and to report any of those seeps or leaks that he has seen himself or that have been reported to him by any of the farmers."

TR. 695

"Q. During the spring of 1946—was a ditch rider employed in the spring of 1946 along that segment of the canal?

A. Yes.

Q. Are the ditch riders required to submit reports to you of any evidence of seep?

A. The ditch riders report each day during the irrigation season. May I enlarge on this point? I would like to give a little detail.

Q. All right, go into that.

A. On the North Canal the ditch riders are called into the office at seven o'clock every morning and I personally talk to the ditch riders as to their rides of the previous day and their water requirements for the next day or two, and since I have been on this job I have personally called these men or they have called me every morning that the canal is in operation and water distributed to the farmers.

Q. How do you select these men?

A. Well, these men, we try to get qualified men, and preferably men that are farmers and understand farming.

Q. Are they acquainted with the area?

A. In most cases they are."

TR. 713-16

"Q. Now, you stated that in 1944 your attention was called to the seepage of water in the Hust place. That was brought to your attention by whom?

A. By the watermaster, Bert Adams. He was acting manager at that time.

Q. Did I understand in your examination of the canal after viewing that water on the Hust place you examined the canal about five hun-

dred feet upstream from a point opposite this water and four or five hundred feet downstream?

A. No, it about four hundred feet upstream and, oh, seven or eight hundred feet downstream, as I remember.

Q. You made that examination by going along afoot in the canal?

A. That is right.

Q. At that time did you also examine the Shaw place?

A. No. No, I did not.

Q. Did you ever go down onto the Shaw place and go over any part of that afoot looking for seepage?

A. No, I did not."

* * * (714)

"Q. When were you first informed of that?

A. Well, that is very noticeable from the canal bank.

Q. Will you please answer my question? When were you first informed of that leak?

A. That seep was called to my attention in the summer of '44.

Q. That has continued since that time?

A. Yes.

Q. Now, is it not a fact that that seep runs throughout at least a period of the year in the spring and fall when there's no water in the canal?

A. Possibly it does."

* * * (714-715)

"Q. When you went down the canal investigating the canal to find the source of the leak on the Hust place did you go as far north as to cover the section of the canal included in the break of 1946?

A. Yes, I would say I did.

Q. And at that time you knew of the leak or seepage in the coulee about four hundred feet north of the field shown in Exhibit 82?

A. That is right.

Q. As you examined the canal you found no evidences of leakage in the bottom of the canal?

A. I did not.

Q. You found no evidences of leakage in the outer bank of the canal?

A. This one leak that was there, yes.

Q. I mean in the canal itself?

A. No, nothing in the canal itself.

Q. Yet those leaks existed at that time? That is, there was water coming out of the toe of the outer bank at that time?

A. It showed in that ravine close to the toe.

Q. Yes. Then what investigation did you make, if any, to determine if that water was coming from any other source along the canal?

A. I made no further investigation.

Q. You made no investigation into the mountain side bank of the canal?

A. I did not.

Q. Now, as a matter of fact, about all the view or investigation you made of the Shaw place to determine whether any of that ground was seeped was as you rode along the top of the ditch bank in a car and observed it as you passed?

A. That is right.

Q. I believe you stated you went along there in the spring of 1946?

A. I did.

Q. And on that occasion, when you say you observed no evidence of seepage in the Shaw field, that was the time when you rode along the ditch bank in a car?

A. That is right."

TR. 68

The trial court stated in his opinion:

"There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break

because of the circumstances mentioned. The Court holds that the absence of ordinary care in this respect has not been demonstrated by this showing.

The next question is as to the competency of the inspection. It is not contended that there was no inspection. This, of course, would have been contrary to fact."

TR. 86-87

In holding the defendant liable in the two flooding cases, the court stated in his opinion:

"Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof. * * *

"The defendant was handling a highly dangerous instrumentality in a position where the lands of plaintiffs were peculiarly exposed to peril, and was bound to exercise a degree of care proportionate to the injuries likely to result to others if the ditch did not hold the stream. * * *

"The defendant, knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens."

TR. 760-61

Mr. Pettet, defendant's witness, testified:

"Q. Mr. Pettet, you say you checked the seep that comes up on the Hust place?

A. I check it occasionally.

Q. How long has that seep been running there?

A. Well, I am not sure, but I remember that has been running there for three or four years.

Q. Has it increased in volume?

A. I don't believe it has.

Q. And are you familiar with the seep that is just north of the north edge of the Shaw place, in that gulley?

A. Yes.

Q. How long has that seep been there?

A. Well, I have known of it three or four years anyway.

Q. In riding the ditch, as you call it, you drive a car along the roadway on top of the ditch?

A. That is right."

TR. 467

Mr. Newell, defendant's witness, testified:

"Q. And has the water been used in the canal for irrigation at all times since that time?

A. It has been used throughout the irrigation season ever since, except for this break and one previous break.

Q. Where was the previous break?

A. Oh, it was about thirty miles up the canal from the last break.

Q. Had there ever been any break of this canal from a point approximately 30 miles upstream from this break to and including its entire length downstream at any time since it has been serving this area, other than the break or breaks in question in this litigation?

A. Yes, sir, there was one minor break in so-called East Cow Hollow some time in the intervening period. I am not sure of the date.

Q. How long did that prevent people from receiving water downstream?

A. It is my recollection that the water was turned out on that occasion not more than two or three days.

Q. How far is Cow Hollow from this Mile Post 36?

A. I guess about 10 miles upstream."

TR. 484

Mr. Newell testified on cross-examination:

"Q. Now, these other breaks that counsel asked you about, where did they take place? There was one, you saw, at Cow Hollow that you remember very well, then one at a point about ten miles above the break that we are talking about.

A. I remember there was a break in Cow

Hollow and I was there before it was completed, but I am not sure just how long the water was out of the canal. (420)

Q. Are you familiar enough with that area to be able to say whether the canal followed about the same type of structure as it did down at mile post 36?

A. No; the canal where it broke in Cow Hollow was in deep cut.

Q. In a deep cut?

A. Yes.

Q. Now, what other breaks do you recall on which you can give me some idea as to the nature of the terrain that it was built over?

A. The 1940 break between the Owyhee River and Mitchell Butte was at a point where the canal was located around the end of a ridge, a rocky ridge.

Q. That would be somewhat like this Mile Post 36 break? Or would it?

A. No, it was a more dangerous looking situation, I considered, than this one."

TR. 485-87

Mr. Newell testified on cross-examination:

"Q. Now, do you recognize the fact that there might be danger in cross-cutting a porous stratum that would soak up water where there is no core wall of the nature that would cut that porous stratum off?

A. Wherever specially pervious stratum was encountered it should have attention.

* * * 486-87

"Q. * * * Well, assuming that your ditch and construction across the country intercepts a gravel bed, or a bed of porous structure that does get into the bedding of the ditch and under the ditch and up the inside bank and of such nature that water would seep into it, would that in your judgment, be a condition that should be remedied?

A. Yes, sir. * * *

Q. * * * I am referring to Exhibit 80. Suppose a condition actually exists as portrayed on there, would you say that that was such a condition that should have some special remedying? * * *

A. If there is a loose porous stratum located as the exhibit shows, then it should be corrected."

TR. 125-29

Theodore Matherly, plaintiffs witness, testified:

"Q. Among other areas that you plowed, Mr. Matherly, did you plow on any land that laid up close to the ditch?

A. Well, not only that one field for Mr. Shaw.

Q. And where was the field that you actually did plow in relation to the bank of the ditch?

A. It was right under the ditch, kind of close

to that draw that runs down through there.

Q. Can you see that map that is nearest to you, Exhibit No. 82, that is on the billboard there? Does that drawing, in your mind, show about the location of the land under the ditch?

A. Yes, it does.

Q. Now, step over there and show to the Court about where you were plowing, Mr. Matherly.

A. This shows here the draw that the water rushed down (indicating).

Q. Yes.

A. Right in this area, right in here (indicating). We was plowing right down through this draw, like this, and my outfit was mired down right in there (indicating).

Q. Now, will you take this pencil and just mark the word 'plowing' at about the spot that you say that you were plowing in there?

A. Well, I don't know that I could get that right on the spot or not.

Q. Oh, no,—just as near as you can.

A. But I could get somewheres close, I think. (Witness here placed a mark on said exhibit).

Q. Will you put your initals after that 'T.' or 'T.M.'"

* * (127)

"Q. And what do you say, now, about whether you were able to plow on that or not?

A. No, we had to release on that. We couldn't plow it. We had to go around it.

Q. Why?

A. Too soft; couldn't go through it."

* * * (128)

"Q. How much of that whole area delineated on that map—there is supposed to be 4.30 acres—how much of that would you say was too wet to farm there in March of 1945?

A. Well, I really couldn't answer that question. It seemed to be in spots. We would hit a soft spot and I would get stuck and we would pull around a little way and then we would hit another one. There seemed to be several of those spots, and where we would hit them we would just leave them.

Q. And how many spots would you say that you encountered there on that occasion that were too wet to plow?

A. Oh, four or five."

TR. 138-39

Arthur C. Hawkins, plaintiffs witness, testified:

"Q. Were you there at any time before the break, so as to observe the nature of the soil around below the break?

A. Yes, I was there. I noticed—it was quite noticeable the alkaline formation all underneath the canal there."

TR. 140-41

Hawkins testified further:

"Now, then, with that information (direction on the map) with that in mind, where is the area that you noticed as wet?

A. Well, this is the canal up here. (indicating). Immediately underneath this canal for, or, for quite an area here. (indicating)

Q. How close up to the bank of the canal?

A. Well, underneath the canal there is a lateral or feed ditch that runs down and runs south, and underneath that feed ditch is where it was wet. I happened to plow up there too, that same—in '46, I think it was. I had a crawler tractor and I plowed up there and I got stuck also."

And at TR. 142:

"Q. Do you remember whether or not the water was in the canal?

A. No, it hadn't been in the canal.

Q. It was before the irrigation season started?

A. Yes, that is right.

Q. And how wet was it in relation to whether you could plow or not?

A. Well, I had a crawler tractor and of course that wouldn't get stuck, but one wheel of my plow would get down so I would get stalled. It would hit the bottom of the furrow and drop down.

Q. Was it muddy?

A. Yes, it was very muddy.

Q. Were you able to plow some of that area or not in there?

A. I couldn't plow some of that next to the ditch. It was too muddy."

TR. 171-72

George Hust, plaintiffs witness, testified:

"A. —and I saw a little stream of water running down. Well, I stepped out of the ditch up on the bank and went on up and was going up the headgate—I presumed this water was coming from the headgate, and I got up a little ways and I saw my ditch dry again, so I stepped in the ditch and walked on up the ditch to the headgate."

* * *

"Q. Now, as I understand your testimony, there was part of that ditch that the water was flowing in and then you got above that water flow and the ditch was dry?

A. That is right.

Q. Could you tell where that water came from that was flowing in the ditch?

A. I couldn't tell exactly, no. I couldn't say where it was coming from. I could see where it came into the ditch but I couldn't see where it was coming from.

Q. And how far up the ditch from—Well,

take it the other way: How far down from the headgate was the ditch dry until you ran into this water flow?

A. About, I would say, three hundred yards.

Q. And then how much water was flowing in the ditch below where the water came into the ditch?

A. I wouldn't attempt to estimate it, but there was enough so that it was flowing."

TR. 187-89

Mr. John Turner, plaintiffs witness, testified:

"Q. Was there any of that area, John, that was wet, that you had difficulty in getting your machinery to operate on?

A. Yes. We was pitching hay, was in that particular field that particular day, and up here by this lateral we had the tractor that was coming on a slip, and we had horses drawing a slip, and as we got up here to the very top of this ditch,—

Q. Which ditch?

A. This here lateral,—As we got up close to it,—Of course, we had been in the field quite a little ways—we got the tractor stuck, and so my cousin, who was pitching with me, said 'We have got to get this tractor out,' and so as we were doing that we saw the water that was seeping in where the wheels spinned down.

Q. How far was that particular spot below the main canal, the Owyhee Canal?

* * * (188)

A. I would say approximately 250 feet.

Q. From the main canal?

A. Yes.

Q. And how much of an area was so wet you couldn't operate a tractor?

A. Well, we couldn't see clearly, but, looking over it, we could estimate approximately an acre and a half.

Q. How far was the water from the surface of the ground?

A. The water wasn't on the surface of the ground, but we could see down where it was when the wheels cut down in the ground.

Q. How deep did your wheels cut in the ground?

A. I would say approximately five or six inches.

Q. And did the water rise in the tracks?

A. Yes.

Q. And how did you get the hay off?

A. Finally we had to pack this hay up here with pitchforks.

Q. Who was doing the cutting of the hay?

A. Ben Shaw cut the hay.

Q. And with what type of equipment?

A. He cut this hay with horse-drawn equipment.

Q. And how could you say whether he had any difficulty?

A. I could see where his horses had walked across and mired down in there."

TR. 200

Mr. Ben Shaw, plaintiffs witness, testified:

"Q. * * * Well, during '45 did you have any trouble harvesting that crop?

A. Some.

Q. And what was your trouble due to?

* * *

A. In binding across this particular place the bull wheel of the binder would slide.

Q. Was it wet?

A. It was wet."

TR. 201

"Q. * * * did you have any trouble in cutting that hay crop in '46, Ben?

A. I did.

* * *

Q. The first crop; and just what was your difficulty there?

A. Well, it was just too muddy to mow across. I did manage to wallow through it. I used horses.

Q. Was there water on the surface, or just immediately below the surface?

A. Well, just immediately below, you might say. Like I say, it would just come up in the horse tracks but never seemed to run off."

TR. 491

Mr. Newell, testified on cross-examination:

"Q. Now, if you had seen this condition as depicted even by these photographs, and had also considered water seeping from the bank on the lower side, do you think now that you would have checked on that and have done something to remedy that leaking condition?

A. If I had seen water seeping through the bank, or immediately at the toe of the bank, I would have directed that something be done.

Q. And you would have done that because you would have thought it would be necessary to preserve the ditch?

A. That is correct."

TR. 487-88

Mr. Newell, defendant's witness, testified on cross-examination:

"Q. Now, in your years of actual experience I presume you have seen ditches and canals, Mr. Newell, where water seeped out of the side and water rose at the toe of the canal and even springs came out? I presume you have seen that?

A. Yes, sir.

Q. What would that indicate to you as to the porosity of the canal banks or of the canal bed?

A. If seepage appears on the outside of the bank, then naturally the bank is pervious, and if it appears below the bank, above any farmer's own irrigation, then it would indicate that there was seepage under the bank.

Q. Now, take a canal that was built, say, in 1934, as this canal was built, and those indications of seepage are present for a number of years, that would lead you to think that water might be seeping through there that would naturally tend to weaken the stability of the canal itself?

A. If seepage had been present in the outside of the bank, then that is correct."

TR. 507

And at TR. 507 this witness testified:

"Q. All right, assume that water was coming out, rising to the surface, immediately under the toe of the ditch in an amount that ran into a perceptible stream, would that make any difference to you in your judging about the safety of the canal?

A. Immediately at the toe of the bank?

Q. Yes.

A. Yes, sir.

Q. It would?

A. That would."

TR. 579-81

Mr. Carter, defendant's witness, testified on cross-examination:

"Q. Now, this farmer's ditch on the Shaw place is just a short distance below the toe of the outer bank of the canal?

A. That is right.

Q. About how far, would you say, Mr. Carter?

* * *

A. I would say in some places it was 5 feet and in other places it was maybe 20 feet away. It didn't exactly follow the toe of the bank.

Q. Now, if it appears that it was testified in this case that at a time when the head was turned off, when this lateral was closed and no water coming from the canal into the ditch, there were at places in this farmer's ditch live or flowing water, where would you say that came from?

A. Well, I wouldn't know. Let me see if I understand you. No water, there hasn't been any irrigation in the farmer's ditch for some little time?

Q. Yes.

A. Water is out from the main canal?

Q. No, water is in the main canal.

A. Oh, water is in the main canal.

Q. But the headgate in this ditch is closed, so it is receiving no water from the regular source

of supply, and there is at places in this ditch live or flowing water. Where would you say that came from?

A. Well, the logical conclusion would be that it was coming from the canal bank—can't attribute it to any other source, under those conditions that you described.

Q. Yes, and if that continued over a period of time it would indicate a continuous seepage from the canal?

A. Yes, sir, under the conditions you have stated it would."

TR. 419-21

James W. Bouton:

"Q. In your experience as an engineer, and particularly such experience as you have had in designing projects, would it be good engineering or sound and safe construction, in a hillside such as the North Canal, to build the lower side of a canal over a pervious structure without a core wall which would tend to cut off the seepage from the head ditch? * * * (420)

A. It would not be good engineering practice to build a canal through a pervious piece of earth without some consideration to the fact that it was pervious, and some sort of preventative should have been put in that canal at that time, either a core wall or lining the entire canal, bottom and both sides.

Q. Assuming that there was no core wall there and the ditch was not lined on either side prior to the break, would you say, under the conditions that you found, that that was good construction? * * * (421)

A. No, it was not."

TR. 467-68

Testimony of R. J. Newell:

Q. And has the water been used in the canal for irrigation at all times since that time?

A. It has been used throughout the irrigation season ever since, except for this break and one previous break.

Q. Where was the previous break?

A. Oh, it was about thirty miles up the canal from the last break.

Q. Had there ever been any break of this canal from a point approximately 30 miles upstream from this break to and including its entire length downstream at any time since it has been serving this area, other than the break or breaks in question in this litigation?

A. Yes, sir, there was one minor break in so-called East Cow Hollow some time in the intervening period. I am not sure of the date.

Q. How long did that prevent people from receiving water downstream?

A. It is my recollection that the water was turned out on that occasion not more than two or three days.

Q. How far is Cow Hollow from this Mile Post 36?

A. I guess about 10 miles upstream.

Q. Would you describe the structure of this

North Canal at the point of the break, that is, the construction?

A. The location of the canal at the point of the break was along the lower part of the sidehill. It was at a point where a small part of the outside bank was in fill and required a core bank, and it was located rather deep in the sidehill, so that the outside bank was very heavy."

TR. 525

Oscar G. Boden testified in answer to plaintiff's counsel's question:

"A. * * * It also shows, by means of a dotted line here, the position of a core bank wherever needed, and the specification provide that where that is build it shall have a height, a minimum height, of a foot above the designed water depth, and a minimum top width of 8 feet. * * * "

(530-532)

Q. * * * Now, then, in just plain English language, so it will be indicated, how far do the field notes show a core bank in connection with the actual repairs that were made in both the first and second breaks in this case, upstream and downstream?

A. Well, if we go away back here to the page preceeding, it shows 600 or more feet, and it goes back in number, in distance, and the break was at 1906 plus 25, and it shows core bank proceeding on the lower side of the canal—here at this Station 1912 plus 25, some 600 feet beyond the point at which the canal broke.

Q. In which direction?

A. Downstream.

Q. Downstream. What does it show upstream?

A. Well, I stop at 600 feet. It continues on back for a considerable distance. On the downstream end there it shows that we ran into a heavier cut there at about 600 feet, but there wouldn't be any core bank there, and some distance it starts in again. * * *

Q. But, in any event, as I understand your testimony, the core bank that was constructed was for the entire length of this particular repair that was made, is that correct?

A. Oh, yes, some distance each side, continuous."

and at page 539-41:

"Q. Now, when were these field notes made, then, in relation to the time of construction?

A. Before construction. They would have to be, because they show the excavation limits and the depth." * * *

and at pages 541-43 Mr. Boden on cross-examination:

Q. Mr. Boden, did you finally check this exhibit you were testifying from to determine the exact yards you had in the core wall?

A. The notes show there that in that 50 feet, according to the calculations, there was 3 cubic yards.

Q. Three cubic yards?

A. Yes, sir.

Q. Now, that would over be an area 50 feet long and how wide? What is the base of your core?

A. That one section there, the base is about 3.8 feet, and the other 3.6.

Q. That is, in width?

A. Yes, sir. * * *

Q. Now, the purpose of the core wall is placing in the bank a stratum of impervious material so the water could not soak through? That is the purpose?

A. That is basically the purpose, yes."

TR. 427

James W. Bouton testified:

Q. During the construction,—How could the canal have been built so that the break could have been avoided?

A. They could have put in the same core wall that they put in there after the break occurred, if that core wall was down far enough below the pervious material, or it could have been lined.

Q. Either method, in your judgment, would have prevented the break?

A. Either would have prevented the break, I think. * * * (429)

A. I think the same condition existed there that existed in the other point, that would be my opinion, and that the core wall was not carried far enough down the stream to prevent another break."

TR. 488

Mr. Newell:

"Q. Well, assuming or taking into consideration the fact that this ditch, right in the middle of the irrigation season, without any additional water in the ditch for pressure, no storms or earthquakes or anything, went out, wouldn't that indicate to you that that ditch was pretty wet?

A. That there was a weakness somewhere, yes, sir."